(2)

Supreme Court, U.S.
FILED

JUN 29 2005

OFFICE OF THE CLERK

No. 05-27

In the Supreme Court of the United States

RICHARD WEBSTER,

Petitioner,

v.

UNITED AUTO WORKERS, LOCAL 51, INTERNATIONAL AUTO WORKERS, ARTHUR BIANCHI, NATHANIEL MARTIN, GIL WOJCIK, ROSALYN GRANT, HOLLY WAINGROW, WILLIAM MICHAEL KIRKSEY, ILLIE WILLIAMS, ROBERT LEE MITCHELL, JAMES MOORE, STEPHEN YOKICH, MAURICE MITCHELL, STAN GEIS, PETE CUTWAY, NATE GOODWIN, AND EUNICE STOKES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

BENJAMIN WHITFIELD
Counsel of Record
CYNTHIA J. GAITHER
BENJAMIN WHITFIELD & ASSOCIATES, P.C.
220 W. CONGRESS, SECOND FLOOR
DETROIT, MI 48226
(313) 961-1000

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

1. Whether otherwise discipline alleged violative of Sec. 411 (a)(2) and Sec. 411 (a)(5) of 29 U.S. C. 411, the LMRDA, is solely confined to those types specifically enumerated in LMRDA.

2. Whether "otherwise discipline" alleged violative of Sec. 411 (a)(2) and Sec. 411 (a)(5) of 29 U.S. C. 411, the LMRDA, when exacted by the duly elected executive boards or bargaining committees of labor organizations constitutes the opprobrium of the organization or mere ad hoc retaliation not subject to the protections of LMRDA.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings are set forth in the case caption. Petitioner is not a publicly traded company owning stock.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding And Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 2

I. Overview of the Case 2

II. Background of the Case 3

III. Proceedings Below 10

Reasons for Granting the Petition 11

I. Review Is Warranted Because Of Inconsistent Decisions In The Federal Circuits On What Constitutes "Otherwise Discipline" Violative Of The Labor Management Reporting And Disclosure Act, 29 USC Sec. 411 20

Conclusion 22

APPENDIX 1a

A. Order Denying Petition For En Banc Hearing 3/31/05 . . . . . 1a

B. Opinion of Sixth Circuit Affirming Judgment of District Court 1/12/05 . . . . . 3a

C. Opinion and Order Granting Defendants Motion for Summary Judgment 11/04/03 . . . . 16a

D. District Court Judgment 11/18/03 . . . . . 46a

E. District Court Order Denying Motion for Rehearing And/or Reconsideration 11/18/03 . . 48a

TABLE OF AUTHORITIES

Cases

Breininger v Sheet Metal Workers,
493 U.S. 67 (1989) 14, 17, 18, 19

Black v Ryder – P.I.E. Nationwide, Inc.
970 F 2d 1461 (6th Cir 1992) 14

Commer v McEntee,
145 F. Supp. 2d 333 (S.D.N.Y. 2001) 13

Guidry v Intl. Union of Operating Eng.,
907 F. 2d 1491(5th Cir. 1990) 21

Hebert v General Truck Drivers,
(E.D. La. 2004) 21

Kinslow v American Postal Workers Union
222 F. 3d 269 (7th Cir. 2000) 12, 20, 21, 22

Konen v Int'l Broad Team
255 F. 3d 402 (7th Cir. 2001) 12

Miller v Holdeen,
535 F. 2d 912 (5th Cir. 1976) 13-15

Shales v General Chauffeurs,
(N.D. Ill. 2003) 13

Tincher v Piasecki,
520 F. 2d 851 (7th Cir. 1975) 21

Cases

U. F. C. W. Local 911 v. U.F.C.W. Inter Union,
301 F. 3d 468 (6th Cir. 2002) 14

Williams v United Steel Workers of America
234 F. Supp. 2d 542 (M.D.N.C. 2002) 13

Statutes

29 USC. Sec. 411 (a)(1) 1

29 U.S.C. Sec. 411 (a)(2) 1, 3, 13, 20, 21

29 U.S.C. Sec. 411 (a)(5) 2, 13, 21

Rules

Supreme Court Rule 10 11

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit denied Petition for en banc rehearing on March 31, 2005. (App. 1a) The January 12, 2005 panel opinion of the Sixth Circuit is reported at 394 F.3d 436 (6th Cir. 2005). (App. 3a) The November 4, 2003 Opinion and Order of the United States District Court for the Eastern District of Michigan. (App. 16a)

STATEMENT OF JURISDICTION

The Sixth Circuit issued its en banc opinion on March 31, 2005. This Petition for Certiorari is timely in that Petitioner has filed it within 90 days of March 31, 2005. The Court has jurisdiction pursuant to §28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §411 et. seq.

29 U.S.C. §411(a)(h) – (a)(2) reads:

"(a) (1) Equal rights

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any vies, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. §411(a)(5) reads:

(5) Safeguards against improper disciplinary action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

STATEMENT OF THE CASE

I. Overview of the case

The Sixth Circuit held that the District Court properly dismissed Petitioner's claims that he was unlawfully

disciplined in violation of the Labor Management Reporting and Disclosure Act 29 U.S.C. §411(a)(2) – (5) finding that Defendants' conduct and treatment of Petitioner did not rise to the level of prohibitive discipline set forth in the Act. The en banc petition for rehearing was denied. The legislative history and congressional intent of 29 U.S.C. §411(a)(2) – (5) suggests that the meaning of unlawful discipline by labor organizations is not exhaustive or patently clear and remains an important questions of federal law.

II. Background of the case

The Sixth Circuit panel affirmed the District Court's grant of Defendants' motions for summary judgment holding that Petitioner offered no proofs to create a genuine issue of material fact as to any of the allegations in his second amended complaint, i.e., (1) violation of the Labor Management Reporting and Disclosure Act, (2) injurious falsehood, (3) intentional infliction of emotional distress, and (4) continuing acts of defamation and retaliation.

Richard Webster worked at Daimler-Chrysler, Mound Road Engine Plant for 35 years and held several elected union positions UAW 51 Local Union. He was outspoken about contract issues affecting his constituency.

In 1997, Webster refused to sign the 1997 settlement agreement with Chrysler because it meant job loss for his constituents at the Mound Road Engine Plant. News reporters asked Webster why he had walked out and Webster stated that International Union had "sold out" the membership. A 28-day strike followed. International Union officials put on the spot by Webster's truth-telling caused some of the nigh-raking Chrysler officials to publicly accused others of falsehoods.

After Webster's walkout in 1997 he was the target of reprisals, rejection, lies, threats, cartoons, humiliation, slander, libel, deprivation, ostracization by the named defendants. (JA 553-554)

In October 1998, a former UAW Local 51 President was removed for misappropriation of that unions' funds because of an investigation prompted by Webster. In a UAW Local 51 executive board meeting in October 1998, Webster raised the issue of financial improprieties of then UAW Local 51 recording secretary, Michael Kirksey. Webster never called Kirksey "a thief" in that board meeting, but was later sued by Kirksey for defamation. (JA 557).

In November 1998 at a general membership meeting of UAW Local 51, Webster presented financial reports which clearly showed Kirksey had received lost time pay for a period when he was on disciplinary layoff. A motion to investigate Kirksey was made by the membership. Financial reports of UAW Local 51 confirmed that Kirksey had received lost time pay in violation of the UAW Local 51 bylaws and the constitution. (JA 882, 888)

In deposition International defendant Stan Geis testified that he reviewed Kirksey's vouchers and pay stubs and found no impropriety. The Kirksey vouchers indicated Kirksey had received lost time pay August 21, 24 and 27, 1998 for attending elections hearings. There were no election hearings in 1998. (JA 891-900). Geis testified that he had meet with Kirksey to discuss allegations of financial impropriety in January and March 1999. Kirksey, in his lawsuit for defamation against Webster, testified that he had only met Geis once on March 10, 1999 at a UAW Local 51 board meeting.

In June, 1999 Michael Kirksey sued Webster and his co-worker friends for defamation, et al, relying upon a letter of exoneration given to him by Defendants, Stan Geis. (JA 872-878).

In 1999 Webster and the named UAW Local 51 defendant, were members of the Bargaining Committee of defendant UAW Local 51 union. The defendant Bargaining Committee and Chrysler management had no face-to-face negotiations but only reports. In October 1999, the defendant's Bargaining Committee composed of Webster and the UAW Local 51 Defendants, never agreed to hold a ratification vote. (JA 557, 571-578). But a document entitled "Contract Highlights", compiled and distributed by the defendant Bargaining Committee members stated that the bargaining committee had agreed to a ratification vote. Webster, while a member of the Bargaining Committee knew nothing of the Committee's "Contract Highlights" document and simultaneously published a document entitled "Contract Lowlights". (JA 557, 580-581). Webster's "Contract Lowlights" document reported the negotiations between the UAW Local 51 and Chrysler management. The "Lowlights" document did not urge a vote against the local settlement agreement. On October 27, 1999, the membership rejected the local agreement. Webster never campaigned against the local agreement, but his documents informed the membership of the bargaining committees responsibility to go back to the bargaining table after the no-vote on the local agreement. Thereafter, defendants began bombarding the general membership with negative literature, lies, posters, flyers, and cartoons about Webster. (JA 554, 588-593, 595-618). At the time of this personal attack of UAWS/Local defendants, Webster was not a candidate for any union election. The negative literature passed around about Webster by

UAWS/Local defendants did not ask the membership to support the local agreement. (JA 524-525).

The negative and untruthful documents admittedly published by the UAW Local 51 defendants were entitled "A Candid Conversation with Sir Richard of Webster". Each of the documents portrayed a conversation between Webster and one of the named UAW Local 51 defendants. The names appearing on the documents are those of the UAW Local 51 defendants who comprised the UAW Local 51 Bargaining Committee. The portrayed conversations in the documents contradicted and attacked Webster's "Contract Lowlights" documents and personally attacked Webster as a liar. All of the UAW Local 51 Defendants have admitted in deposition testimony that they neither spoke with Webster as suggested in the documents, nor were the statements therein made by Webster. The UAW Local 51 defendants continued publishing and distributing negative papers which portrayed Webster as a liar. (JA 613-618). From 1999 through 2002, flyers, posters, cartoons about Webster were posted and laying around the Mound Road Engine Plant where Webster worked. (JA 970).

In November 1999 through December 1999, Webster filed charges, and appeals to both the UAW Local 51 defendants and the Executive Board of UAW Local 51 and to defendants, International Union. Defendants either ignored Webster's charges or deemed them as untimely or improper.

Webster filed an appeal in December 1999, with Defendants UAW Local 51, related to Defendants Bianchi's failure to stop Defendant Robert Mitchell from preventing Webster from representing his constituents in second-step grievances. Webster, having received no response to the December 9, 1999 appeal, then appealed on December 10,

1999. It was January 2002 when Webster learned that Defendants had assessed his December 9, 1999 appeal as an Art. 31 charge under the UAW Constitution.

In December 1999, Webster also filed a charge against all of the named UAW Local 51 Defendants for violation of the UAW Ethical Practices Code. (JA 663-669). The Defendants sat as members of the Executive Board of Defendants UAW 51 Local along with other members having authority to decide the propriety of Webster's December, 1999 charge. Art. 31. Sec. 3(1), of the UAW Local 51 Constitution governs when a local Executive Board itself is being charged and prohibits the charged members from deciding the propriety of the charge. Defendants as members of the UAW Local 51 Executive Board in violation of Art. 31 rendered a decision on Webster's December, 1999 charge in the January, and 2000 general membership minutes. Defendants ruled that Webster's December, 1999 charge was improper. Webster was unaware of Defendants' ruling on the charge until discovery in 2003.

In September 2002, Webster filed an appeal with Defendants UAW Local 51 over its dissolution of the bylaws committee and his removal as chairperson. Defendant, Rosalyn Grant who was recording secretary of Defendant UAW Local 51 refused to bring Webster's appeal before the Executive Board. In October 2002 Webster filed two other appeals. Defendants, UAW Local 51 granted those appeals but then Defendant International Union via Defendant Eunice Stokes set the appeals aside as improper. In November 2002, Webster appealed Defendants, Stokes' decision of the appeals to Defendants International's Executive Board. Webster never received a final decision from Defendant, International Union which he needed in order to make any further appeal to the Public Review Board.

In October, 2002, when Webster filed an appeal with Defendant Local 51 for conduct unbecoming a union official because of Defendant, Rosalyn Grant's failure to present his appeals, Webster was told that his charges as to Grant were improper. On December 30, 2002 Webster appealed the decision about Defendant Grant to Defendant International Union. In February 2003, Defendant Eunice Stokes answered Webster's appeals but without particularity. Webster requested clarification from Defendant Stokes' answers to his appeals. To date Webster has received no response from Defendant International Union.

Webster, a UAW Local 51 committee man since 1988, won election in 1998. An election protest was filed with defendant UAW 51 Union requesting a re-run election. Contrary to the election protest requirements of UAW Constitution, the protest was addressed to the Defendant International Union instead of Defendant Grant, recording secretary of Defendant UAW Local 51. The membership merely concurred in the protest for a re-run election and sent it to Defendant International Union. Defendant International Union in turn informed the membership that its concurrence did not constitute a decision. In July 1998 at a general membership meeting of Defendant UAW Local 51 a motion was again made for a re-run election between Webster and Darryl Mitchell (not a defendant). The motion was ruled out of order. An appeal to that motion was submitted to Defendant Stokes. Stokes held an election hearing on October 1, 1998 without any notice to Webster. After a review of the voting records, Defendant Stokes determined that Webster would have won against Darryl Mitchell even in a re-run election. On April 6, 1999 Defendant International Union mandated a re-run election to be held and Webster again won. International Defendant Stokes admitted in deposition that Defendant Nate Gooden impacted her decision to hold a re-

run election contrary to Art. 33 of the UAW Constitution. International Defendant Steve Yokich (deceased) also sanctioned the re-run election protest without jurisdiction contrary to the UAW constitution.

With no election ongoing, International Defendant Wojcik and Stokes denied Webster the exercise of his union rights under the UAW Constitution in May and November 1999. In May 1999, International Defendant Gil Wojcik overrode the national contract between Defendant International Union and Chrysler which Webster had negotiated. Wojcik's override undermined Webster's bargaining power and affected his constituents in violation of the national contract grievance procedure.

Defendant Stokes failed, as required by the UAW Constitution, to obtain records from Defendant UAW Local 51 in reviewing Webster's November 8, 1999 charge. Defendant Stokes set aside Webster's December 1999 appeals or refused to respond specifically to them. Defendant International Union took 9 months to render a decision on Webster's November 8, 1999 charge where the UAW Constitution requires an answer within 90 days. The president of Defendant International did not respond to any of Webster's written requests to him on Webster's appeals.

In 2002, Defendant Robert Lee Mitchell wrote posters/flyers which referred to Webster as a "punk", "rotten lowdown feces eater" and as the number 1 maggot of mayhem, retired maggot. (JA 645). In 2002, a Defendant UAW Local 51 agent/representative/employee in a membership meeting called Webster shaky, inconsistent, untruthful and stated that Webster did not take care of his constituents.

In 2002, Defendant Gil Wojcik in a Chrysler council meeting stated to Defendant Local 51 Union's members "not to have anything to do with" Webster. In September 2002, Webster was wrongfully removed as chairman of the bylaws committee of Defendants UAW Local 51 by Defendants Bianchi, Stokes, and Yokich, who had no authority to do so. Webster continues to be unable to exhaust his administrative remedies as to the 2002 Article 33 appeal letters without a final decision from Defendant International Union and Defendant Stokes. In 2003, Defendant UAW Local 51 and Defendants denied Webster's written request to review Defendant UAW Local 51's November 2002 – February 2003 membership meeting minutes and UAW Local 51 lost time vouchers for Defendants Bianchi, Martin, Waingrow, Grant, and Williams. To date Defendant UAW Local 51 and Defendant International Union and the named Defendants have not responded in any form to Webster's written request to view the aforementioned minutes and vouchers.

In 2003, Webster began fearing for his personal safety because of the continuing acts of the named Defendants, i.e., receiving early morning hang-up calls to his home and threats to his personal friends by Defendants. International Defendant Yokich threatened Webster's personal friends who were co-workers to disassociate from Webster and that he (Yokich) was going to "gut" Webster. Webster, threatened, humiliated, degraded, finally succumbed to Defendants' conduct. Webster suffered emotional illness and an early-unplanned retirement.

III. Proceedings Below

In December, 2001, Petitioner, Richard Webster filed a cause of action against United Auto Workers Union, elected officials of Local 51 of United Auto Workers Union, and

International United Auto Workers Union and elected officials of that union. Webster amended his complaint in May 2003. In September 2003 Defendants filed Motions for Summary Judgment. The District Court granted Defendants Motions for Summary Judgment on all counts in the Second Amended Complaint. The District Court held that under the LMRDA Petitioner failed to specially plead damages and admitted same as to the injurious falsehood claim. The District Court held that Defendants' conduct was neither extreme nor outrageous as to the claim for intentional infliction of emotional distress. Finally, the District Court held Petitioner demonstrated no evidence of continuing acts of defamation/retaliation by Defendants.

On November 14, 2003, Petitioner filed a Motion for Rehearing in the District Court. On November 18, 2003 the Court denied the Motion for Rehearing. (App. 48a) On December 5, 2003, Petitioner filed Notice of Appeal timely in the U.S. Court of Appeals Sixth Circuit. On January 12, 2005 the Sixth Circuit affirmed the District Court's grant of Summary Judgment. (App. 3a) On March 31, 2005 the Sixth Circuit panel denied Petition for Rehearing En Banc. (App. 1a)

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. On consideration is that a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter..." Finally, the Court considers whether the court of appeals decision "has so far departed from the accepted and usual course of judicial

proceedings...as to call for an exercise of this Court's supervisory power..."

All of these considerations are presented in this case. Cases filed against labor organizations in federal courts constitute a major portion of federal claims.

The term "otherwise discipline" set forth in 29 U.S.C. 411 et. seq. commonly known as the Labor Management Reporting and Disclosure Act, (LMRDA) is not defined in the LMRDA nor is the term defined in the legislative history or the Congressional intent of the LMRDA. The application of the term "otherwise discipline" in union member claims alleging discipline labor organizations violative of the LMRDA remains uncertain and inconsistent in federal case law.

The inconsistency by the Federal Court in interpretation of the term "otherwise discipline" in union members claims alleging discipline violative of the LMRDA by labor organizations has created and continues to raise important federal questions.

In *Webster v United Auto Workers*, Local 51, 394 F. 3d 436 (6th Cir 2005) the Sixth Circuit concluded that Webster failed to show evidence of discipline as is defined by the Act. (App10a) [In arriving at that decision the Sixth Circuit Court looked to the 7th Circuit in *Konen v International Brhd Team 200*, 255 F 3d 402 (7th Cir 2001) where it held the Plaintiff was not "disciplined" in violation of the Act because he was never subject to official union discipline... and there was no evidence that the plaintiff's membership rights or status had been diminshed in any way. (App 10a) In *Kinslow v American Postal Workers Union*, 222 F. 3d 269 (7th Cir. 2000) the 7th Circuit, *contra Webster, id* found that the

plaintiff had been disciplined because he had been disparaged, his complaints ignored and he was expelled from the Union.

Federal District Court opinions vary in finding union defendants' violations of the Act where the Plaintiffs have alleged being "otherwise disciplined" in violation of either the equal rights or free speech sections of the Act, Sec 411(a)(2) or Sec 411 (a) (5). *Herbert v General Truck Drivers, Chauffeurs, Warehousemen and Helpers, Local 270*, (E,D,La. 2004; (Plaintiff failed to allege facts of official union action taken against him violative of LMRDA); *Shales v. General Chauffeurs, Sales drivers and Helpers Local Union No. 330*, N.D. Ill. 2003, No. 00C575). (Plaintiff announced intent to run against incumbent union official and was fined, suspended and expelled from union therefore); *Williams v United Steel Workers of America, AFL-CIO/CLC*, 234 F. Supp. 2d 542 (2002) (Plaintiff's claims of removal from union office based on retaliation for posted Confederate flag didn't demonstrate violation of the Act); *Commer v. McEntee*, 145 F. Supp. 2d 333 (2001) (Plaintiff who was suspended from union and banned from running for offices failed to allege facts that his protected rights under the Act had been violated).

The Fifth Circuit in *Miller v Holden*, 535 F. 2d 912 (5th Cir. 1976) held that the complaint failed to allege any unlawful union activity within the scope of the prohibitions of the Act, *id* 914. The *Miller Court* construed the term otherwise discipline in general terms after noting that neither the Act nor its legislative history define discipline id. 914. The *Miller* Court defined "discipline" to conform with the basic character of those specifically enumerated types of discipline in the Act, i.e., fine, expulsion, and suspension. *id.* 914. The 1976 *Miller* Court construction of the term "discipline" continues today to be the bedrock to plaintiffs' defeat in the Circuit Courts and in our United States Supreme

Courts when violations of the LMRDA are alleged as "otherwise discipline." The *Miller* Court's definition of the term "discipline" created a narrow and almost impenetrable shield to establishing claims for union violations of the LMRDA other than those disciplines specifically enumerated in the Act.

The Sixth Circuit Court of Appeals in *Black v Ryder – P.I.E. Nationwide, Inc.* 970 F. 2d 1461, 1469 (6th Cir. 1992) held the plaintiff's suspension for picketing violated the LMRDA). In *U.F.C.W. Local 911 v. U.F.C.W. International Union*, 301 F. 3d 468, 475, (6th Cir. 2002) the Sixth Circuit found no violations of the LMRDA by the Defendant union where the plaintiffs were not fined, expelled or suspended for picketing to protest a jurisdictional decision made by defendant unions.

In *Breininger v. Sheet Metal Workers International Association Union No. 6*, 493 U.S. 67 (1989), the United States Supreme Court affirmed the Sixth Circuit's holding, inter alia, that the petitioner had failed to state a claim under the LMRDA but did not adopt the reasoning of the Sixth Circuit in reaching that holding *id* 90. Relying on the construction of the term "otherwise discipline" in *Miller supra*, the Court in Breininger stated:

> Using the phrase "otherwise discipline," Congress did not intend to include all acts that deterred the exercise of rights protected under the LMRDA, but rather meant instead to denote only punishment authorized by the union as a collective entity to enforce its rules. *The term refers only to actions "undertaken under color of the union's right to control the member's conduct in order to protect the interests*

of the union or its membership." Miller v Holden, 535 F Ed 912, 915 (CA5 1976).

Our construction of the statute is buttressed by its structure, First, the specifically enumerated types of discipline dine, expulsion, and suspension –imply some sore to established disciplinary process rather than ad hoc retaliation *id* 92 by individual union officers, *id* 92. *Second, Sec. 101 (a) (5) includes procedural protections – "written specific charges" served before discipline is imposed, "a reasonable time" in which to prepare a defense, and a "full and fair hearing" – that would not apply to instances of unofficial, sub rosa discrimination. These protections contemplate imposition of discipline through the type of procedure we encountered in Boilermakers v Hardeman, 401 U.S. 233, 236-237 (1971) (expulsion after trial before union committee, with subsequent international union review). The fact that Sec 101 (a) (5) does prohibit union discipline although, but rather seeks to provide "safeguards against improper disciplinary action," indicates that "discipline" refers to punishment that a union can impose by virtue of its own authority over its members. A hiring hall could hardly be expected to provide a hearing before every decision not to refer an individual to a job.*

The legislative history supports this interpretation of "discipline." Early drafts of Sec. 101 (a) (5), for example, contained elaborate lists of "due process protections," such as the presumption of innocence, venue restrictions, the right to counsel, the right to confront and cross-examine witnesses, and other guarantees typically found in the criminal context, id 93. Congress envisioned that "discipline" would

entail the imposition of punishment by a union acting in its official capacity. See 105 Cong. Rec. 5812 (1959) (remarks of Sen. McClellan) (referring to "safeguards . . . against improper disciplinary action" as procedures that must be followed before a union member can be "excelled or punished," tried," or "suspended" by the union; *id.*, at 6023 (remarks of Sen. Kuchel) (noting that discipline may be imposed only on "the usual reasonable constitutional basis upon which (criminal) charges might be brought"). *Id* 93...

In the instance case, petitioner alleged only that the union business manager and business agent failed to refer him for employment because he supported one of their political rivals. He did not allege acts by the union amounting to "discipline" within the meaning of the statute. *According to his complaint, he was the victim of the personal vendettas of two union officers. The opprobrium of the union as an entity, however, was not visited upon petitioner. He was not punished by any tribunal, nor was he the subject of any proceedings convened by defendants. In sum, petitioner has not alleged a violation of Sec. 101 (a) (5) and (609, and the Court of Appeals correctly dismissed his claim under the LMRDA.*

We express no view regarding the merits of petitioner's claim. *We hold only that the Court of Appeals erred when it determined that the District Court lacked jurisdiction over the suit, but that the Court of Appeals correctly found that petitioner failed to state a claim under Sec. 101((a (5) and 609 of the LMRDA. We remand the cause for further proceedings consistent with this opinion.* 493 U.S. 95.

The *Breininger Court* stated further:

> In the instant case, petitioner alleged only that the union business manager and business agent failed to refer him for employment because he supported one of their political rivals. He did not allege acts by the union amounting to "discipline" within the meaning of the statute. According to his complaint, he was the victim of the personal vendettas of two union officers. The opprobrium of the union as an entity, however was not visited upon petitioner. He was not punished by any tribunal, nor was he the subject of any proceedings convened by defendants. In sum, petitioner has not alleged a violation of Sec. 101 (a)(5) and 609, and the Court of Appeals correctly dismissed his claim under the LMRDA, 493 U.SA. 67, 92.
>
> ...Congress' reference to punishments typically imposed by unions as entities through established procedures indicate that Congress meant "discipline" to signify penalties Applied by the union in its official capacity rather than ad hoc retaliation by individual union officers... 493 U.S. 67, 92.

In his dissent, in part in *Breininger, supra,* Justice Stevens takes issue with the Court of Appeals' restrictive interpretation of the LMRDA and that the Court erred in both the construction of the petitioner's complaint and its interpretation of the LMRDA, *id* 73.

Further in his dissent, Justice Stevens notes that where the Court acknowledged that the ability to refer to workers for employment through a hiring hall was a power of the union

granted by the collective bargaining agreement, the Court had properly concluded that the petitioner's allegation that the two union officers had used this union granted authority to punish him for his union activities should have also been sufficient to support a claim that the punishment imposed on petition was under color of the union's right to control its membership and that the "opprobrium of the union as an entity" was "visited upon petitioner." 493 U.S. 67, 99 110 S. Ct. 424.

Justice Stevens noted that the *Breininger Court* said discriminatory use of the hiring hall to punish petitioners did not amount to discipline because it was not an "established disciplinary process" or one imposed by "any tribunal" or as the result of "any proceeding." 493 U.S. 67, 99. Countering the Court's posture, Justice Stevens says:

> But, as Congress was well aware...discipline can be imposed informally as well as formally and pursuant to unwritten practices similar to those petitioner has alleged as well as to a formal established policy. The language and structure of the Act do not evince any intention to restrict its coverage to sanctions that are imposed by tribunals *100 or as the result of proceedings. That Congress specified detailed procedures to be followed in disciplinary proceedings does not mean that no procedure need to be followed when discipline is imposed without any proceeding whatsoever. Nor does the legislative history, which reflects Congress' intention to prevent a wide range of arbitrary union action, support such a crabbed reading. By holding that the informally imposed sanctions alleged here are not covered by the LMRDA, the Court ironically deprives union members of the protection of the Act's procedural safeguards at a time when they are most needed –

> when the union or its officers act so secretly and so informally that the member receives no advance notice, no opportunity to be heard, and no explanation for the union's action. The construction of the labor organization's "Bill of Rights" is perverse and cannot have been intended by Congress, 493 U.S. 67, 99-100.

Finally, as to the *Breininger Court's* interpretation of the petitioner's LMRDA claim, Justice Stevens notes:

> Today the Court correctly refuses to adopt the Court of Appeals' reasoning but its rationale is just as flawed as that of the Court of Appeals. Retaliation effected through a union job referral system in a form of discipline even if the system is used by nonmember as well as members and even if the sanction is the result of an ex parte ad hoc, unrecorded decision by the union.
>
> I respectfully dissent from the Court's disposition of petitioner's claim under the Labor-Management Reporting and Disclosure Act of 1959, 493 U.S. 67, 102.

As a further indication of the need for this Court's review of guidance to develop a consorted definition of the term "otherwise discipline" as it relates to claims under LMRDA, even the *Breininger Court, supra*, in commenting on its holding (plaintiff failed to allege facts violative of LMRDA) in its footnotes, cautioned:

> We do not imply that "discipline" may be defined solely by the type of punishment involved, or that a union might be able to circumvent Sections 101 (a)(5)

> and 609 by developing novel forms of penalties different from fines, suspensions, or expulsions...[W]e do not hold that discipline can result only from "formal" proceedings, as opposed to "Informal" or "summary" ones. We note only that Congress' reference to punishments typically imposed by the union as an entity through established procedures indicates that Congress meant "discipline" to signify penalties applied by the union in its official capacity rather than ad hoc retaliation by individual union officers. *Id* at 92 n.5.

I. Review Is Warranted Because Of Inconsistent Decisions In The Federal Circuit On What Constitutes "Otherwise Discipline" Violative Of The Labor Management Reporting And Disclosure Act, 29 U.S.C. Sec. 411.

In *Kinslow v American Postal Workers Union*, 222 F. 3d 269 (7th Cir. 2000), the 7th Circuit Court of Appeals, the plaintiff was expelled, disparaged to his other union members, his complaints of objectionable treatment ignored and the plaintiff had accused union officials of financial improprieties. The *Kinslow* plaintiff requested financial records of the defendant union which were also ignored. The plaintiff in *Kinslow* sued under Sec. 411 (a)2), inter alia, alleging retaliation for his suit against defendants and exercising his rights to protest. *Kinslow* was awarded equitable relief damages for loss of free speech rights under LMRDA, inter alia, and awarded $150,000 in punitive damages. *Id* 273. The 7th Circuit in *Kinslow* stated that to merit such an award, the plaintiff must show that (1) in retaliating against the plaintiff, the union acted willfully or with reckless disregard for the plaintiff's interest; and (2) the conduct of the union was egregious or the harm it inflicted was severe. *Id* 279.

Applying that test in *Kinslow* the 7th Circuit found that despite the protestation of the Defendant union the record was replete with egregious conduct manifesting a specific intent to harm the plaintiff in retaliation for voicing his concerns about corruption. The defendant union in *Kinslow* in objecting to the award of punitive damages tried to distance itself from its union president, but the 7th Circuit said that a union can only act through its agents, and the actions and intentions of the local union president would usually be imputable to the union. *Tincher v Piasecki*, 520 F. 2d. 851 (7th Cir. 1975), *Guidry v Intl. Union of Operating Eng., Hebert v General Truck Drivers*, (E.D. La. 2004) 907 F. 2d 1491(5th Cir. 1990), The *Kinslow* Court found that the union members rarified the union president's heavy-handed tactics in the expulsion of the plaintiff, and that the union never made any attempt to make things right with the plaintiff. *id* 279.

In finding that the plaintiff in *Webster v United Auto Workers Local 51, et al,*_ 394 F. 3d 436 (6th Cir. 2005) failed to show that he had been disciplined in violation of LMRDA, the Sixth Circuit Court of Appeals looked to and found *Webster's* reliance on *Kinslow, supra* unpersuasive. *id* 441. Webster sued the defendant unions and defendant union officials under LMRDA Sec. 411 (a)(2) and Sec. 411 (a)(5) The Sixth Circuit held that the district court correctly found that *Kinslow* was not applicable because the plaintiff in *Kinslow* was actually expelled from the union and Webster was not. *id* 442.

Webster's second amended complaint alleged that the defendant unions and defendant union officials retaliated against him after he refused to agree to a 1997 Local Settlement Agreement and made police statements about defendant union selling out the membership. Thereafter Webster was the target of lies, investigation into financial

defamation, threats, humiliation, and ostracization by defendant.

The Court in *Webster supra* measured the allegations of discipline by how closely they resembled ad hoe retaliation by individual union officials or, in contrast punishment authorized by a collective entity to enforce its rules. *id* 441. (App 9a) applying that reasoning, the Court found that Webster failed to show evidence of "discipline" as it is defined by the Act. *id* 441. (App 10a) The *Webster Court* said that the allegations as presented show Webster was the target of ad hoc retaliation by individual union officials not subject to the practices of the LMRDA.

Conclusion

The Petition for a writ of Certiorari should be granted. The *Kinslow*, supra facts are analogous to those in *Webster, supra* with the exception that Webster was not expelled. The Court should reverse the holding of the Sixth Circuit Court of Appeals. Petitioner further requests this Court grant the petition and provide uniform guidance to the Federal districts as to what constitutes "otherwise discipline" for purposes of allegations of violations of the Labor Management Reporting and Disclosure Act.

Respectfully submitted:

BENJAMIN WHITFIELD, & ASSOCIATES, P.C.
BY: BENJAMIN WHITFIELD, JR.. ESQ.(P40755)
CYNTHIA J. GAITHER ESQ/(P40755)
220 W. Congress, Second Floor
Detroit, MI 48226
(313) 961-1000

June 29, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-2601

[Filed March 31, 2005]

RICHARD WEBSTER, Plaintiff-Appellant,	)
v.	)
UNITED AUTO WORKERS LOCAL 51, ET AL., Defendants-Appellees.	)

BEFORE: KENNEDY, MARTIN, and MOORE, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-2601

[Filed January 12, 2005]

RICHARD WEBSTER,
Plaintiff-Appellant,

v.

UNITED AUTO WORKERS, LOCAL 51, INTERNATIONAL UNITED AUTO WORKERS, ARTHUR BIANCHI, NATHANIEL MARTIN, GIL WOJCIK, ROSALYN GRANT, HOLLY WAINGROW, WILLIAM MICHAEL KIRKSEY, ILLIE WILLIAMS, ROBERT LEE MITCHELL, JAMES MOORE, STEPHEN YOKICH, MAURICE MITCHELL, STAN GEIS, PETE CUTWAY, NATE GOODWIN, and EUNICE STOKES, jointly and severally,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 01-74983
Victoria A. Roberts, District Judge

Before: KENNEDY, MARTIN, and MOORE, Circuit Judges.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. Richard Webster brought this action against United Auto Workers, elected officials of Local 51, and International United Auto Workers and some of its elected officials alleging (1) violation, by constructive discharge, of the Labor Management Reporting and Disclosure Act, (2) injurious falsehood, (3) intentional infliction of emotional distress, and (4) continuing acts of defamation and retaliation. The district court granted defendants' motion for summary judgment and Webster timely appealed. We AFFIRM, because Webster offers no proof to create a genuine issue of material fact.

I.

Webster began working for Chrysler Corporation in 1964. From 1974 to at least September 2002, he held full-time elected union positions in which he represented plant employees and performed contract administration duties. During negotiations for the 1997 Local 51 Settlement Agreement with Chrysler, Webster learned that Local 51 management had agreed silently to end propshaft production at the Mound Road Engine Plant. Because the agreement would have resulted in the loss of several hundred jobs at the plant, Webster refused to sign it. A twenty-eight day strike followed. In responding to questions from the media, Webster stated that International Auto Workers had "sold out" the membership. Webster alleges that as a result of his opposition he became the target of "reprisals, rejection, humiliation, slander, libel, deprivation, [and] ostracization from all named Defendants."

Webster argues that we should consider the following facts as continuing acts of reprisal against him. In May, Local 51 held elections for positions at the Mound Road Engine Plant. Webster won re-election as the Matching Division Committeeman. The election results were contested by Darryl Mitchell, not a party to this case, who alleged misconduct by Webster's challenger. The union assigned defendant Eunice Stokes to investigate. She overturned the election results and ordered a re-run election, in which Mitchell would run against Webster. Webster won the second election.

In November, Webster noticed that an employee, defendant Michael Kirksey, received lost-time pay for which he was not eligible according to Local 51 bylaws and the United Auto Workers Constitution. Webster disputed the pay and defendant Stan Geis, the Administrative Assistant to the Secretary-Treasurer, investigated the alleged impropriety, although he had no authority to do so. Geis determined that Kirksey committed no impropriety. Kirksey then sued Webster in June 1999 for defamation. As evidence of the falsehood of Webster's accusations, Kirksey submitted a letter of exoneration from Geis.

In 1999, Webster and certain defendants sat on Local 51's bargaining committee. In August, they began negotiations with Chrysler for the Local Collective Bargaining Agreement. A settlement was reached in October and a vote for ratification was scheduled. Volumes of literature were distributed, by Webster among others, in favor of and against the agreement. Webster acknowledges distributing documents "informing the membership of the bargaining committee's responsibility to go back to the bargaining table after the no-vote on the local agreement." Defendants present evidence that Webster distributed to Local 51 members "marching orders" to "go out there and disrupt, excite, and whip the

rank and file up over any and every issue so that we can prevent the [agreement] from being ratified." The membership did not ratify the agreement. A second vote for ratification was scheduled.

In the meantime, the bargaining committee distributed its own literature seeking support of the agreement and criticizing Webster. For example, the committee distributed a series of documents containing satirical question-and-answer conversations with Webster. One was entitled "A Candid Conversation with Sir Richard of Webster." Webster claims that these documents were not written to garner support for the agreement, but rather to portray him as a liar. He claims that defendants were "bombarding the general membership with negative literature, posters, flyers, [and] cartoons about [him]." He demanded an apology from the committee; in response, the committee distributed literature entitled, "So Richard You Want An Apology," which, Webster says, apologized to Local 51 members for not "taking him out" sooner.

On the second vote, the membership ratified the agreement. Subsequently, Webster filed several internal charges against the local officials relating to the allegations made in this action, and alleging violations of the United Auto Workers Ethical Procedures Code. The charges were dismissed by the union's Executive Board, which was composed of named defendants.

Webster appealed that decision to Local 51, raising these three issues: (1) the cancellation of a meeting in which Local 51 management was to consider Webster's allegations, (2) the failure of Local 51's Executive Board to notify Webster of its decision to dismiss his charges, and (3) the intervention of Local 51's Executive Board to block Webster's charges. The

appeal was denied. Webster contends that local and national union management deliberately ignored his charges and dismissed them with no explanation. He states that he "finally succumbed to defendants' conduct and suffered emotional illness and early unplanned retirement."

In December 1999, Webster's doctor advised him to take sick leave. Webster refused, and ultimately began to abuse alcohol. By December 15 he was not able to work; his doctor prescribed medication and a therapy program. On December 31 he retired from Chrysler and, pursuant to the National Agreement, he was required to relinquish his union position. However, he remained chairman of the bylaws committee until September 2001.

Simultaneous with his retirement, Webster brought this action. The district court dismissed each of Webster's claims on summary judgment, and Webster timely appealed.

II.

We examine an appeal of a summary judgment utilizing the standard of review employed by the district court. *Qualicare-Walsh, Inc. v. Ward*, 947 F.2d 823, 825 (6th Cir. 1991). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

III.

1. Labor Management Reporting and Disclosure Act

The Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2), secures the right of every member of any labor organization to

> meet and assemble freely with other members; and to express any views, arguments, or opinions and to express at meetings of the labor organization his views upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility or every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Section 411(a)(5) prohibits a union from fining, suspending, expelling, or "otherwise disciplining" any of its members for exercising rights secured under the Act. *See Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 90, 107 L. Ed. 2d 388, 110 S. Ct. 424 (1989). Webster, who concedes that he was"not officially discharged or suspended," argues that he was "disciplined" in violation of the Act by the local and international union. Webster alleges that the discipline he received was the unions' "concerted activity to disparage [him] to the membership and to deny him the right to challenge this concerted activity within the context of a union hearing." As to this claim, the district court

determined that Webster failed to allege facts to show that he was "disciplined" in violation of the Act.

We agree that Webster fails to show that defendants "disciplined" him. The Supreme Court has concluded "that by using the phrase 'otherwise disciplined,' Congress did not intend to include all acts that deterred the exercise of rights protected under the [Act], but rather meant instead to denote only punishment authorized by the union as a collective entity to enforce its rules." *Breininger*, 493 U.S. at 91; *accord UFCW Local 911 v. UFCW Int'l Union*, 301 F.3d 468, 473 (6th Cir. 2002). According to the Breininger Court, as a general rule, a union member is "disciplined" when the union takes action "'under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership.'" 493 U.S. at 91 (quoting *Miller v. Holden*, 535 F.2d 912, 915 (5th Cir. 1976)). It described such discipline as punishments typically imposed by the union as an entity through established procedures meant to signify penalties applied by the union in its official capacity, "rather than ad hoc retaliation by individual union officers." *Id.* at 92, n.15.

In light of this description, we have measured allegations of discipline by how closely they resembled ad hoc retaliation by individual union officials or, in contrast, punishment authorized by a collective entity to enforce its rules. United Food, 301 F.3d at 473-74. In *United Food*, we concluded that the alleged discipline -- which basically constituted a reassignment of union members to an area outside of the union's jurisdiction -- represented the kind of ad hoc retaliation not governed by the Act. We also found it significant that the alleged punishment in that case did not result from an established union disciplinary process. Id. (citation omitted). In making this decision, we looked to the

Seventh Circuit's holding in *Konen v. International Brotherhood of Teamsters*, Local 200, 255 F.3d 402, 410 (7th Cir. 2001), that a plaintiff was not "disciplined" in violation of the Act because he was "never subjected to official Union discipline . . . and there [was] no evidence that his membership rights or status [had] been diminished in any way."

We apply this reasoning to conclude that Webster failed to show evidence of "discipline" as it is defined by the Act. Even assuming that Webster did retire and that he could satisfy some of the elements of constructive discharge, he presents no evidence to show that the alleged treatment of him was authorized by a collective entity to enforce its rules or that it resulted from an established union disciplinary process. As presented by Webster, he was the target of the kind of ad hoc retaliation by individual union officials that is not subject to the protections of the Act.

Webster's argument to the contrary, based on the Seventh Circuit's decision in *Kinslow v. American Postal Workers Union*, Chicago Local, 222 F.3d 269 (7th Cir. 2000), is not persuasive. In that case, the Seventh Circuit affirmed a district court's finding that the Postal Workers Union unlawfully retaliated against plaintiff Kinslow, who had brought to its attention certain criminal acts by the union president. *Id.* at 272. The union disparaged Kinslow to other union members, ignored his complaints of improper treatment, expelled him from the union, and refused to reinstate him after his allegations against the president were revealed to be true. *Id.* at 272-73, 279. The district court correctly found that *Kinslow* was not applicable because the plaintiff in that case was actually expelled from the union, and Webster was not.

2. Injurious Falsehoods

Second, Webster claims that defendants committed injurious falsehood in violation of Michigan law by distributing cartoons and other publications that portrayed him as a "liar." In Michigan, a defendant commits an injurious falsehood if it publishes a false statement either with knowledge of its falsity or "in reckless disregard of its truth or falsity." *Kollenberg v. Ramirez*, 127 Mich. App. 345, 339 N.W.2d 176, 179 (Mich. Ct. App. 1983); accord *Falls v. Sporting News Publ'g Co.*, 834 F.2d 611, 617 (6th Cir. 1987). Recovery for injurious falsehood is appropriate where there has been "some interference with an economically advantageous relationship which results in pecuniary loss." *Kollenberg*, 339 N.W.2d at 177-79. In order to establish a prima facie case of injurious falsehood, a plaintiff must show: (1) that the defendant published a false statement to a third party knowing that statement to be false or acting in reckless disregard for its truth or falsity; (2) that the defendant knew, or should have known, that this false publication would likely result in pecuniary loss or in harm to the interests of the plaintiff having a pecuniary value; and (3) that the plaintiff suffered special damages as a result. *Neshewat v. Salem*, 173 F.3d 357, 364 (6th Cir. 1999) (citing *Kollenberg*, 339 N.W.2d at 179).

Without analyzing the district court's conclusion regarding Webster's pleading of special damages, we affirm the court's dismissal of this claim because Webster fails to present evidence to support the elements of the claim. In their motion to dismiss, defendants argued that Webster failed to produce any evidence that defendants published any false statements or that they knew or should have known that any false statements would likely result in pecuniary loss or in harm to any interest of Webster's having pecuniary value. In response to

defendants' motion, Webster stated only that he properly alleged the elements of the claim. He provided absolutely no evidence to support any element of the claim. There is simply nothing in the record to show that defendants knew or had reason to know that their statements were false, that defendants knew or should have known that their statements would likely result in any pecuniary loss, or that Webster suffered any special damages as a result. Webster's claim for injurious falsehood fails on summary judgment. For that reason, the claim is properly dismissed.

3. Intentional Infliction of Emotional Distress

Third, Webster claims intentional infliction of emotional distress. Under Michigan law, the elements of a claim of intentional infliction of emotional distress are (1) extreme or outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Graham v. Ford*, 237 Mich. App. 670, 604 N.W.2d 713, 716 (Mich. Ct. App. 1999) (citing *Haverbush v. Powelson*, 217 Mich. App. 228, 551 N.W.2d 206 (Mich. Ct. App. 1996)). In ruling on such a claim, "it is initially for the [trial] court to determine whether the defendant's conduct reasonably may be regarded as so extreme and outrageous as to permit recovery." Doe v. Mills, 212 Mich. App. 73, 536 N.W.2d 824, 834 (Mich. Ct. App. 1995) (citing *Sawabini v. Desenberg*, 143 Mich. App. 373, 372 N.W.2d 559 (Mich. Ct. App. 1985)). However, "where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability." Restatement (Second) of Torts § 46 cmt. h (1965); *see also Linebaugh v. Sheraton Mich. Corp.*, 198 Mich. App. 335, 497 N.W.2d 585, 588-89 (Mich. Ct. App. 1993) (noting that whether conduct is sufficiently outrageous and extreme to render one liable for

the intentional infliction of emotional distress is a matter for determination by the trier of fact). Here, the trial court properly concluded that Webster failed to allege any facts on which a reasonable person would find extreme or outrageous conduct.

Extreme or outrageous conduct is that which goes beyond the bounds of decency and would be considered atrocious and utterly intolerable in civilized society. *Johnson v. Wayne County*, 213 Mich. App. 143, 540 N.W.2d 66, 74 (Mich. Ct. App. 1995); *see also Margita v. Diamond Mortgage Corp.*, 159 Mich. App. 181, 406 N.W.2d 268, 271 (Mich. Ct. App. 1987) (stating that liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities). As evidence of extreme or outrageous conduct, Webster identifies defendant Kirksey's suit against him for defamation, defendants' refusal to process his allegations of impropriety against certain defendants, and defendant Yokich's alleged warning to Webster's co-workers to "disassociate from plaintiff" because "he was going to 'gut' plaintiff." Webster claims that these instances constitute outrageous and extreme conduct that forced him to retire, and, at the very least, reasonable minds could differ as to whether defendants' conduct was extreme or outrageous.

In support, Webster relies on the case of *Haverbush*, 217 Mich. App. 228, 551 N.W.2d 206, for the proposition that simply because he contends that certain alleged facts represent extreme and outrageous conduct a grant of summary judgment is precluded. In response, the district court stated that where alleged conduct does not rise to the level of conduct that is extreme or outrageous, summary judgment is appropriate. The district court recognized, moreover, that the decision in Haverbush was limited to its particular facts, which undoubtedly would lead reasonable minds to find the extreme

and outrageous conduct absent here. In *Haverbush*, 217 Mich. App. 228, 551 N.W.2d 209-10, defendant

> (1) sent a barrage of letters to Haverbush, to his daughter, and to his future in-laws, in which she called him a compulsive liar, threatened his fiancee with physical harm, and threatened to tell his colleagues that he had harassed [her]; (2) left lingerie on Haverbush's vehicles and at his residence several times; (3) left an ax and a hatchet on his vehicles, after having asked him how his fiancee would like to have an ex through her windshield; (4) told a co-worker several times that someone should "ice" Haverbush; and (5) wrote several letters threatening to move in with him even though he was engaged and would soon be married.

Webster fails to allege conduct that rises to this extreme degree. Webster was subject only to the kinds of insults and indignities that Michigan courts have determined are not properly the bases for a claim of intentional infliction of emotional distress. *See Margita*, 406 N.W.2d at 271. The district court properly dismissed the claim.

4. Continuing Retaliation and Defamation

Finally, Webster claims continuing acts of defamation and retaliation. The district court properly found that Webster presented no evidence to show that defendants continued to publish or distribute the cartoons and other publications of which Webster complains. Also, because Webster cannot show that defendants' conduct constituted defamation or retaliation in any way, any claim that such acts are "continuing" is without merit.

IV.

For the foregoing reasons, we affirm the district court's grant of summary judgment.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 01-74983

[Filed November 4, 2003]

RICHARD WEBSTER,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
UNITED AUTO WORKERS, LOCAL 51,	)
INTERNATIONAL UNITED AUTO WORKERS,	)
ARTHUR-BIANCHI, NATHANIEL MARTIN,	)
GIL WOJCIK, ROSALYN GRANT, HOLLY	)
WAINGROW, WILLIAM MICHAEL KIRKSEY,	)
ILLIE WILLIAMS, ROBERT LEE MITCHELL,	)
JAMES MOORE, STEPHEN YOKICH,	)
MAURICE MITCHELL, STAN GEIS,	)
PETE CUTWAY, NATE GOODWIN, and	)
EUNICE STOKES, jointly and severally,	)
Defendants-Appellees.	)
	)

OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Honorable Victoria A. Roberts

This matter comes before the Court on Defendants' Motions for Summary Judgment [Docs. 34 and 35]. Plaintiff brought this action against Defendants alleging: (1) violation of the Labor Management Reporting and Disclosure Act; (2) retaliation under the Elliott-Larsen Civil Rights Act; (3) injurious falsehood; (4) intentional infliction of emotional distress; and (5) continuing acts of defamation/retaliation.

For the reasons stated below, the Court GRANTS Defendants' Motions in their entirety.

II. BACKGROUND

Plaintiff Richard Webster ("Plaintiff") brought suit against United Auto Workers, Local 51 ("Local 51") and against the following individual members of Local 51: Arthur Bianchi ("Bianchi"), Nathaniel Martin ("Martin"), Rosalyn Grant ("Grant"), Holly Waingrow ("Waingrow"), Oilie Williams ("Williams"), Robert Lee Mitchell ("Mitchell") and James Moore ("Moore") (collectively "Local 51 Defendants"). Plaintiff also named International United Auto Workers ("International Union") as a defendant as well as the following members of International Union: Stephen Yokich ("Yokich"), Maurice Mitchell ("Maurice Mitchell"), Stan Geis ("Geis"), Pete Cutway ("Cutway"), Gil Wojcik ("Wojcik"), Nate Gooden ("Gooden") and Eunice Stokes ("Stokes") (collectively "International Union Defendants").

(Collectively, Local 51, International Union and all individuals will be known as "Defendants").

Plaintiff began working for Chrysler Corporation ("Chrysler") in 1964. Pl. Depo. at 19-20.[1] He held full-time elected union positions since 1974, *id.* at 16-17, 19, where he represented plant employees and performed contract administration duties. *Id.* at 27-28. Even though he was a full-time elected Local 51 official, Plaintiff was employed and paid by Chrysler, *id.* at 618-19. He accrued seniority as a "job setter." *Id.* at 13-14.

In 1997, during bargaining for the Local 51 Settlement Agreement with Chrysler, Plaintiff allegedly learned that Local 51 and management silently agreed to end propshaft production at the Mound Road Engine Plant. Plaintiff, however, refused to signed the 1997 Settlement Agreement because to do so would have meant that several hundred jobs would be lost at the plant. Various media interviewed Plaintiff, asking him why he walked out of the negotiations. Plaintiff responded that he had been "sold out" by members of Local 51.[2] Pl. Br. at 8. A twenty-eight day strike ensued. As a result, Chrysler and International Union officials began publicly accusing one another of falsehoods. *Id.* Since then, Plaintiff alleges that he has been the subject of reprisals.

---

[1] Plaintiff took thirteen days of deposition testimony. None of the parties included his deposition testimony in its entirety in motion papers. Accordingly, this Opinion and Order relies on the citations used by the parties when citing to Plaintiff's deposition.

[2] In the argument section of his brief, Plaintiff states that he walked out of the 1999 Settlement Agreement negotiations and, at that time, informed the media that he had been "sold out." At 27.

In March 1998, Plaintiff wrote a letter to International Union regarding alleged misuse of Local 51 funds. In October 1998, then-Local 51 President Sam Narduccio was removed for misappropriation of union funds. *Id.* at 9.

On May 12, 1998, Local 51 held elections for the committee person and chief steward positions at the Mound Road Engine Plant. Plaintiff ran and won reelection as the Machining Division Committeeman. Darryl Mitchell (not a party to this case) protested the results of the election due to alleged misconduct by Plaintiff's challenger and filed an election appeal asking International Union to order a re-run election.

Stokes, Administrative Assistant to International Union President Yokich, was assigned to investigate the election appeal. She held a finding of fact hearing on October 1, 1998. Her investigation revealed that problems surrounded the election. In light of Stokes' findings, International Union's Executive Board ("IEB") overturned the election and ordered a re-run election. The re-run election was held on May 6, 1999 and Plaintiff defeated Darryl Mitchell for Machining Division Committeeman. Pl. Depo. at 15.

In November 1998, Plaintiff noticed in a Local 51 financial report that William M. Kirksey ("Kirksey"), a Local 51 member not a party to this case, had received a disciplinary layoff. Pl. Exh. 51. Plaintiff maintains that Kirksey then applied for and received lost time pay from June 22, 1998 through June 27, 1998. Pl. Br. at 20. Local 51 membership moved for an investigation of the alleged financial impropriety. Plaintiff, however, did not personally levy any charges against Kirksey, Pl. Br. at 20-21, though he maintains that Kirksey did in fact receive lost time pay in

violation of Local 51 bylaws as well as the UAW Constitution. Pl. Exh. 52.

Geis, the Administrative Assistant to Secretary-Treasurer Ruben Banks, testified in his deposition that he met with Kirksey between January 11, 1999 and March 10, 1999 to investigate the allegation of financial impropriety. Pl. Exh. 54. Plaintiff alleges that neither Geis nor Gooden, who apparently assisted in the investigation, was authorized to conduct the financial investigation under Art. 48, § 3 of the UAW Constitution. Nevertheless, Gels concluded in a letter that, after having reviewed the vouchers and payroll stubs, Kirksey had committed no impropriety.

In May 1999, Local 51 Defendants were elected to the following positions: Bianchi, President; Martin, Vice President; Grant, Recording Secretary; Waingrow, Financial Secretary; Williams, Treasurer. Bianchi Depo. at 9-10, 52-53. Also, Local 51 Defendants Mitchell and Moore were elected, along with Plaintiff, to the shop committee in May 1998 and again in the May 1999 re-run election. Pl. Depo. at 43-44. As for International Union Defendants, Yokich served as President of the International Union from June 1995 to June 2002. Stokes, as previously stated, served as Administrative Assistant to Yokich. Gooden, during relevant times of this lawsuit, was the Regional Director for UAW Region 1. Geis, also previously mentioned, served as Administrative Assistant to Secretary-Treasurer Ruben Burks. Cutway, Wojcik and Maurice Mitchell served as International representatives assigned to the UAW DaimlerChrysler Department.

In 1999, Local 51 Defendants and Plaintiff sat on the Local 51 bargaining committee. Bianchi Depo. at 53. Around August 1999, the committee and Chrysler began negotiations for the Local Collective Bargaining Agreement.

On October 21, 1999, a Settlement Agreement was reached. Local 51 Exh. 2. The 1999 Settlement Agreement stated that "... [t]he Union will recommend to the membership that it be ratified." *Id.* (ellipse and brackets added). Defendants state that Plaintiff signed the 1999 Settlement Agreement. Pl. Depo. at 345-46, 503, 506-07. However, Plaintiff disputes this contention.

Mitchell wrote and distributed two letters to Local 51 members urging them to ignore opposition to ratification of the 1999 Settlement Agreement. Local 51 Exhs. 5 and 6; Pl. Depo. at 553-63. Plaintiff maintains that Mitchell's letters did not mention or urge ratification of the Settlement Agreement. Mitchell's letters, dated October 24, 1999, however, expressly provided that "[s]ome of your union reps **and those** who are blind loyalists have received the following **marching orders**: ... Go out there and disrupt, excite, and whip the rank and file up over any and every issue so that we can prevent the **Mound Road Engine contract from being ratified.**" Pl. Exh. 6, October 24, 1999 Mitchell Letter (emphasis in original; brackets and ellipse added).

Local 51 membership, however, did not ratify the 1999 Settlement Agreement. Local Exh. 7; Pl. Depo. at 567. Local 51 members circulated a petition seeking a second ratification vote. *Id.* at 649. A second vote was scheduled for November 4, 1999. Local 51 Exh. 8.

The bargaining committee responded to Plaintiff's efforts by writing and distributing literature seeking support for the 1999 Settlement Agreement while being critical of Plaintiff. Specifically, a series of documents entitled "A Candid Conversation With Sir Richard of Webster" was disseminated. The "conversations" were written in a question-and-answer format in an effort to create a satirical

conversation with Plaintiff. The bargaining committee also distributed "Are You Interested in the Truth," Local Exh. 21, "Let's Talk About the Truth," *id.* at Exh. 22, and "So Richard You Want An Apology." *id.* at Exh. 23. Plaintiff claims that these "conversations" were not written to garner support for the Settlement Agreement, but rather to look like actual "conversations" with him. Pl. Br. at 11 (citing Pl. Exh. 9, Moore Depo., at 20-21). Plaintiff alleges that the "truth" documents imply that he is a liar. Additionally, Plaintiff maintains that the "So Richard You Want An Apology" document apologized to Local 51 members for not taking him out sooner. Pl. Br. at 12. On October 10, 1999, Plaintiff alleges that Mitchell referred to him as the "Maggot of Mayhem."[3] Pl. Exh. 15, "1 Didn't Sleep At All Last Night." Moreover, Plaintiff observed cartoon caricatures of himself at the Mound Road Engine Plant. Pl. Exh. 1.

On November 4, 1999, the Settlement Agreement was ratified by Local 51. Local 51 Exh. 24. Thereafter, Plaintiff filed several internal union charges against the local defendants related to the allegations made in this action, Pl. Depo. at 122, 166, 689-90, namely the "Conversations," "Truth" and "Apology" pieces noted above. Pl. 2d Amend. Cmplt. ¶¶ 36-37. Plaintiff's November 8, 1999 charge alleged a violation of the UAW Ethical Procedures Code by Bianchi, then-President of Local 51. Plaintiff later learned, "through rumor," Pl. Br. at 13, that the Local 51 Executive Board had denied Plaintiff's charges. Plaintiff, however, admits that he did not exhaust internal union appeals. Pl. 2d Amend. Cmplt. ¶¶ 52-55, 68-71,89-92, 99-102, 129-30.

---

[3] In his opposition brief, Plaintiff alleges that Mitchell referred to him "either as the 'demon or the maggot of mayhem.'" At 13.

Plaintiff appealed the Local 51 Executive Board decision to the IEB on November 30, 1999. He never received a hard copy of the Local 51 Executive Board decision. In her deposition, Stokes testified that she had not been notified of Local 51's Executive Board ruling. Pl. Exh. 12.

On December 2, 1999, Plaintiff filed a charge against all Local 51 Defendants alleging a violation of the UAW Ethcial Practices Code. Local 51 Executive Board decided that Plaintiff's charge was improper and without merit when it released its January 2000 general membership minutes. Pl. Exh. 18, Local 51 Executive Board Meeting Minutes, January 6, 2000. Plaintiff maintains that he was never made aware of Local 51 Executive Board's decision until he filed the present action. Pl. Exh. 2, Pl. Aff., at ¶ 11. Moreover, Plaintiff alleges that Local 51 Defendants were not authorized to hear Plaintiff's December 2, 1999 charge. Pl. Br. at 13-14.

On December 9, 1999, Plaintiff filed an appeal with Bianchi, pursuant to Local 51's bylaws asking Bianchi to intervene because Mitchell was "preventing [Plaintiff] from meeting as a member of the shop committee to represent constituents in 2nd step grievance procedures." Pl. Br. at 14 (brackets added). Plaintiff alleges that Mitchell told management not to meet with Plaintiff on any such procedures unless Mitchell himself called the meeting. *Id.* Plaintiff asserts that "[m]anagement indicated in writing that it had been instructed by... Mitchell not to meet with [Plaintiff]." *Id.* at 14-15 (brackets and ellipse added).

When Bianchi did not respond to Plaintiff's December 9, 1999 appeal, Plaintiff appealed to Local 51's Executive Board on December 10, 1999. This appeal raised three issues: (1) cancellation of the December 199 Local 51 meeting by Bianchi; (2) failure of Local-51's Executive Board to notify

Plaintiff of its decision on Plaintiff's November 8, 1999 charge; and (3) intervention of Local 51 Executive Board in Mitchell's prohibition of Plaintiff's meetings with management on second step grievances. Pl. Br. at 15.

Meanwhile, in December 1999, Plaintiff "was experiencing profound anxiety and depression" as a result of the circumstances at Chrysler. Pl. Exh. 19, Letter from Joel L. Young, M.D. Plaintiff's doctor advised him to take sick leave, but he refused. During that same time period, Plaintiff began to abuse alcohol. By December 15, 1999, Plaintiff was not able work. His doctor prescribed medication and again told Plaintiff to take sick leave. He also prescribed a therapy program.

On December 31,1999, Plaintiff retired from Chrysler, *id.* at 8-9. Under paragraph 17, page 21 of the 1999 National Collective Bargaining Agreement between the National Union, UAW and DaimlerChrysler, Plaintiff was required to relinquish his union position.[4] Local 51 Exh. 1.

In January 2000, Local 51's Executive Board met and treated Plaintiff's December 10, 1999 appeal as a charge under Art. 31 of the UAW Constitution and not under the Local 51 bylaws as Plaintiff had intended.

Also in January 2000, Bianchi requested authority from Yokich to appoint a new bylaws committee for Local 51. Pl. Exh. 18, Local 51 Executive Board Meeting Minutes, January 6, 2000. Plaintiff maintains that this request was improper,

---

[4] Specifically, the National CBA provides the following: "The Plant Shop Committee of the Union Shall consist of not more than six (6) members, each of whom shall be an employee of the plant having seniority .... "

Pl. Br. at 16, and that he was not informed of the dissolution of the bylaws committee until discovery in this lawsuit. Id. On September 18, 2002, Plaintiff filed an appeal to Local 51 on the dissolution of the bylaws committee and his removal as chairman with Local 51 Defendant Grant. In October 2002, Grant, allegedly refused to bring Plaintiff's appeal before the Local 51 Executive Board.

Plaintiff presented his appeals to the membership of Local 51 which granted them. Martin, however, appealed Local 51's decision. Pl. Exh. 29, Martin Appeal. Stokes replied in a letter to Local 51 President, John Williams, instructing him to notify Plaintiff that his appeals were set aside as improper, and to notify him of his right to appeal to Yokich. Pl. Exh. 30, Letter to John Williams.

In October 2002, Plaintiff filed conduct unbecoming a union official charges against Grant for her alleged failure to present his appeal to Local 51's Executive Board. Pl. Exh. 35. Plaintiff was informed by Local President John Williams that his appeal was untimely. Pl. Exh. 37. Plaintiff then appealed to the International Union. Pl. Exh. 38. Plaintiff's appeal was dismissed by letter from Stokes. Pl. Exh. 39. On March 14, 2003, Plaintiff requested that Stokes clarify the response to his appeals. Pl. Exh. 40. To date, Plaintiff has not received clarification.

Plaintiff alleges that all of these events resulted in poor health and his premature retirement on December 31, 1999. Pl. Br. at 22; Pl. Exh. 2, Pl. Aft., ¶ 12.

III. STANDARD OF REVIEW

Under Fed. R. Civ. P 56(c), summary judgment may be granted "if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Copeland v. Machulis*, 57 F.3d 476,478 (6th Cir. 1995). A fact is "material" and precludes a grant of summary judgment if "proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle[s] of law to the rights and obligations of the parties." *Kendall v. Hoover Co.*, 751 F.2d 171,174 (6t" Cir. 1984) (brackets added). The court must view the evidence in the light most favorable to the nonmoving party and it must also draw all reasonable inferences in the nonmoving party's favor. Cox v. Kentucky Dept. of Transp., 53 F.3d 146, 150 (6th Cir. 1995).

The moving party bears the initial burden of showing that there is no genuine issue of material fact. *Snyder v. AG Trucking Co.*, 57 F.3d 484, 488 (6th Cir. 1995). To meet this burden, the movant may rely on any of the evidentiary sources listed in Rule 56(c). Cox, 53 F.3d at 149. Alternatively, the movant may meet this burden by pointing out to the court that the nonmoving party, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case, and on which that party will bear the burden of proof at trial. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937 (6th Cir. 1995); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989). The moving party does not, however, have to support its motion for summary judgment with evidence negating its opponent's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985).

Once the moving party has met its burden, the burden shifts to the nonmoving party to produce evidence of a

genuine issue of material fact. Rule 56(e); Cox, 53 F.3d at 150.

The nonmoving party cannot rest on its pleadings, but must present significant probative evidence in support of its complaint. *Copeland*, 57 F.3d at 479. The mere existence of a scintilla of evidence to support the nonmoving party position will be insufficient; there must be evidence on which a jury could reasonably find for the nonmoving party. *Snyder*, 57 F.3d at 488; Tolton, 48 F.3d at 941.

IV. ANALYSIS

A. Retaliation Claim Under the Labor Management Reporting and Disclosure Act

Defendants argue that because there is no evidence that either Local 51 or International Union took collective action against Plaintiff in 'forcing him out' of the union, Plaintiff's claim under the LMDRA must fail.

The Labor Management Reporting and Disclosure Act ("LMRDA") provides the following:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organizations' established and reasonable rules pertaining to the conduct of meetings: Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of

> every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 411(a)(2). Section 411(a)(5) makes "it unlawful for a union to "fine[e], suspen[d], expe[l], or otherwise discipline" any of its members for exercising rights secured under the LMDRA." *Breininger v. Sheet Metal Workers Intl. Assn. Local Union No. 6*, 493 U.S. 67, 90 (1989) (brackets in original).

The Supreme Court has concluded "that by using the phrase 'otherwise disciplined,' Congress did not intend to include all acts that deterred the exercise of rights protected under the LMDRA, but rather meant instead to denote only punishment authorized by the union as a collective entity to enforce its rules." *Id.* at 91; *see also United Food and Commercial Workers v. United Food and Commercial Workers Intl. Union*, 301 F.3d 468, 473 (6th Cir. 2002). Thus, a union member is "disciplined" when the union takes action "'under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership.'" *Id.* (quoting *Miller v. Holden*, 535 F.2d 912, 915 (5t" Cir. 1976)).

In this case, Plaintiff conceded that he was "not officially discharged or suspended .... " Pl. 2d Amend. Compl. ¶ 50. However, he alleges that he "was constructively discharged (i.e., forced out of the union)[,]" *id.* (brackets added), and was, therefore, "disciplined" for purposes of the LMRDA because he "made statements and filed charges against certain union officials for financial impropriety and other alleged misconduct." *Id.* at ¶¶ 47, 50-51.

As an initial-but perhaps dispositive-matter, Plaintiff has presented no evidence that he was forced out of Local 51. In fact, in his Second Amended Complaint, filed on May 21, 2003, Plaintiff stated that "[a]t all relevant times, Plaintiff has been a dues-paying member in good standing of Defendant UAW 51." At ¶ 105 (emphasis added). Moreover, Plaintiff alleges that he was defamed and/or retaliated against up to and including in 2003.

It is difficult, if not impossible, for the Court to discern how Plaintiff can be both a Local 51 member in good standing up to and including in 2003, while simultaneously being "forced out of the union."

Even assuming that Plaintiff was forced out of Local 51, he has failed to present any evidence that he "received punishment by the union as a collective entity to enforce its rules." *Breininger*, 493 U.S. at 91.

Plaintiff argues that after he filed grievances for Kirksey's alleged impropriety, he became the target of retaliation. He contends that he was subject to verbal and written abuse by Local 51 Defendants. Additionally, he claims that "disdain and disparagement" followed after he walked out of negotiations and told the media that he had been "sold out" by Local 51 in either 1997, Pl. Br. at 7, or 1999. *Id.* at 27. Plaintiff further asserts that he lost his teaching position at Wayne State University because Gooden had influenced Plaintiff's unnamed supervisor at the university. He claims further that he was forced to re-run for his position as committeeman (which he won anyway). These acts, Plaintiff maintains, constitute "discipline" in retaliation for exercising his free speech rights under the LMRDA.

Plaintiff maintains that the cartoon caricatures and the negative documents published about him evidence a violation of the LMRDA because it constituted retaliation for Plaintiff's exercise of free speech rights. Such a claim, then, would ignore the fact that Local 51 Defendants are union members also and, therefore, entitled to the same free speech protection as Plaintiff under 29 U.S.C. § 411(a)(2). Furthermore, the Supreme Court's construction of the "otherwise disciplined" language of the LMRDA was rooted in part on "the specifically enumerated types of discipline-fine, expulsion, and suspension-[which] imply some sort of established disciplinary process rather than ad hoc retaliation by individual union officers." *Breininger*, 493 U.S. at 91-92 (and treatise cited) (brackets added). In short, the exercise of free speech rights by union members other than Plaintiff do not constitute "discipline" for purposes of the LMRDA. Rather, such written and verbal rebukes constitute ad hoc retaliation which is not actionable. *See id.*

Moreover, Plaintiff has not brought forth any evidence which would tend to show that Gooden's conversation with Plaintiff's supervisor at Wayne State evidences that Plaintiff was "disciplined" by either Local 51 or International Union as a "collective entity." *Id.* at 91. Such an action, assuming it took place and that it was done in retaliation of Plaintiff's exercise of his free speech rights, constitutes non-actionable, ad hoc conduct. *See id.* at 91-92.

Plaintiff also attacks the thoroughness of the investigation of Kirksey and the appropriateness of the re-run election in October 1999, but fails to show that these matters resulted in "discipline" by Defendants.

In support of his argument that his charges and/or appeals were "aborted" by Defendants, Plaintiff relies on *Kinslow v.*

American Postal Workers Union, Chicago Local, 222 F.3d 269 (7th Cir. 2000).

In *Kinslow*, the plaintiff union member sought access to the union's financial records after the union president and secretary/treasurer were indicted for making illegal loans, destroying financial records, mail and wire fraud, tax evasion and theft and embezzlement of union funds. *Id.* at 272. The plaintiff was denied access to the records and union leaders became "fed up" with him and "began to retaliate against him." *Id.*

Plaintiff's reliance on *Kinslow* is misplaced for the following reasons: First, there is no evidence that Local 51 Defendants or International Union Defendants have been indicted for any criminal activity. Second, there is no evidence that Plaintiff was denied access to any financial records related to Kirksey or others.[5] Third, there is no evidence that Plaintiff was denied overtime work or that union stewards refused to file grievances on his behalf, as was the case in *Kinslow*. Fourth, Plaintiff's contention that the facts in *Kinslow* are similar to the case at bar must fail because the only evidence in this case that Plaintiff's appeals were futile is based on Plaintiff's claim that his charges were against those who sat on the Local 51 Executive Board and the IEB.

---

[5] In its brief, Local 51notes that Plaintiff requested the 1998 and 1999 lost time vouchers for Local 51 Defendants. Local 51 admits that it rejected the request and instead provided Plaintiff with computer printouts showing lost time payments. Local 51 Exh. 29, Req. No. 3. Local 51 points out that Plaintiff did not file a motion to compel production of such vouchers; but the Court does not need to consider whether or not it should have because Plaintiff fails to bring forth evidence that such a depravation constituted "discipline" for purposes of the LMRDA.

This claim, by itself, is insufficient to show the same futility as the plaintiff in *Kinslow*. The plaintiff in *Kinslow* believed his appeals were futile because the president of the union was indicted on several criminal accounts upon which the plaintiff based his charges, because the president presided over the Plaintiff's charges while criminal charges against him were pending and because the Plaintiff feared for his life. No such facts are present here. Moreover, there is no evidence that Plaintiff feared physical harm as the Plaintiff in *Kinslow* did.

But even if all these factors were similar to those in *Kinslow*, the Court finds that *Kinslow* does not apply because the plaintiff in that case was actually expelled from the union. The Seventh Circuit expressly stated that the union "board charged Kinslow with engaging 'in conduct that would expose the [u]nion to civil liability,' meaning his filing of this suit. Ironically it is this charge that set in motion the events which would contribute to the [u]nion's civil liability in this case. Although the accusation was out of line the [u]nion members voted unanimously to expel *Kinslow*." 222 F.3d at 272-73 (brackets, emphasis and ellipse added). Here, on the other hand, Plaintiff was admittedly "not officially discharged or suspended," but rather, "disciplined" by being "forced out of the union." Pl. 2d Amend. Compl. at ¶ 50. If Plaintiff was forced out of Local 51, he has, nevertheless, failed to show evidence that he was "disciplined" for exercising his rights under the LMRDA.

Accordingly, Plaintiff's LMRDA claim fails because he has failed to show (1) that he was forced out of Local 51-which is the basis for his LMRDA claim; and (2) that he was "disciplined" at all, let alone in retaliation for his exercise of free speech rights. Defendants are entitled to summary judgment on Plaintiff's LMRDA claim.

B. Retaliation Claim Under the Elliot-Larsen Civil Rights Act

Defendants contend that because they did not take any action against Plaintiff due to religion, race, color, national origin, age, sex, height, weight or marital status, that his ELCRA retaliation claim must fail as a matter of law. Defendants further argue that even if Plaintiff claims that he was retaliated against on account of his religion, there is no evidence that Defendants knew of his religion or that he was retaliated against due to his religion.

The Elliott-Larsen Civil Rights Act ("ELCRA") prohibits two or more persons from retaliating or discriminating "against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this aid." Mich. Comp. Laws § 37.2701 (a). The ELCRA also states that a union shall not "[e]xclude or expel from membership, or otherwise discriminate against a member or applicant for membership because of religion, race, color, national origin, age, sex, weight, or marital status." Mich. Comp. Laws § 37.2204(a) (brackets added).

In order to establish a prima facie case of retaliation under the ELCRA, a plaintiff must show the following:

> (1) that he opposed violations of the [ELCRA] or participated in activities protected by the [ELCRA],
> (2) that the company was aware of his participation,
> (3) that the company subsequently took action adverse

> to plaintiff, and (4) that the opposition or participation was a significant factor in the adverse employment decision.

Minnis v. McDonnellDouglas Tech. Serv. Co., 162 F. Supp. 2d 718,738 (E.D. Mich. 2001) (citing *Booker v. Brown* and *Williamson*, 879 F.2d 1304, 1310 (6th Cir. 1989)) (emphasis withdrawn; brackets added). "in order to engage in a 'protected activity', a plaintiff must actually oppose activity that, if true, would be a violation of the civil rights laws." *Comiskey v. Automotive Industry Action Group*, 40 F. Supp. 2d 877, 898 (E.D. Mich. 1999) (citing *Booker*, 879 F.2d at 1313).

Plaintiff alleged that he "engaged in the protected activity of filing formal charges with [Local 51] regarding the alleged financial impropriety and misconduct by certain union officials." Pl. 2d Amend. Compl. at¶ 59 (brackets added). Plaintiff further alleged that there is a causal connection between these charges and inaction on the part of Defendants to investigate the charges which resulted in his constructive discharge. *Id.* at ¶ 62. As stated above, however, "[i]n order to engage in a 'protected activity', a plaintiff must actually oppose activity that, if true, would be a violation of the civil rights laws." *Comiskey*, 40 F. Supp. 2d at 898 (citing Booker, 879 F.2d at 1313) (brackets added). Plaintiff has not alleged that he was retaliated against because of his religion, race, color, national origin, age, sex, height, weight, or marital status; rather, he has alleged that he was retaliated against because he filed charges of alleged financial impropriety and union official misconduct.

Plaintiff points to no authority whereby an allegation of financial impropriety and/or union official misconduct constitutes a violation of civil rights laws. Thus, Plaintiff has

failed to show that he either opposed violations of the ELCRA or that he participated in activities protected by the ELCRA. Such a failure means that Plaintiff cannot establish the first element of a prima facie case for ELCRA retaliation. Accordingly, Defendants are entitled to summary judgment on Plaintiff's ELCRA retaliation claim.[6]

C. Claim for Injurious Falsehood

Defendants further maintain that Plaintiff's claim for injurious falsehood must fail because (1) Plaintiff did not plead the claim with specificity; (2) that their speech was privileged; (3) that there is no evidence that Defendant's speech was false; (4) there was no evidence that Defendants either knew or should have known that their speech would cause Plaintiff pecuniary harm; and (5) Plaintiff failed to plead special damages.

Recovery for injurious falsehood is appropriate where there has been "some interference with an economically advantageous relationship which results in pecuniary loss" *Kollenberg v. Ramirez*, 127 Mich. App. 345, 350-81 (1983) (ellipse added). In order to establish a prima facie case for injurious falsehood, the plaintiff must show the following:

> (1) that the defendant published a false statement to a third party knowing that statement to be false (or

---

[6] In their respective briefs, both Local 51 and International Union argue that Plaintiff has admitted that he was not discriminated against on the basis of his religion. Local 51 Br. at 12-13; International Union Br. at 7. However, it is not necessary for the Court to even consider this argument because Plaintiff states in his opposition brief that his ELCRA claim is a retaliation claim and not a discrimination claim. Pl. Br. at 3.

> acting in reckless disregard for its truth or falsity); (2) that the defendant knew, or should have known, that this false publication would likely result in pecuniary loss or in harm to interest of the plaintiff having a pecuniary value; and (3) that the plaintiff suffered special damages as a result.

Neshewat v. Salem, 173 F.3d 357, 364 (6th Cir. 1999) (citing *Knollenberg*, 127 Mich. App. at 352; Restatement (Second) of Torts, § 623A (1977)).

Defendants correctly state the elements to injurious falsehood, but, in their analysis, consider two additional elements (both of which are elements in the prima facie case for defamation). Plaintiff, on the other hand, does not help his own argument: In the argument section of his brief, he cites the prima facie case for defamation while neglecting to mention, discuss or analyze the law of injurious falsehood as applied to the facts of this case. Perhaps the parties are referring to Plaintiff's original Complaint where Plaintiff alleged defamation under both federal, 29 U.S.C. §§ 157-158, and Michigan law, Mich. Comp. Laws § 600.2911. Plaintiff's original Complaint, however, was superceded by his Second Amended Complaint which did not include any defamation claims.

The Court, thus, will consider, only the three elements to a claim of injurious falsehood, and will do so in inverse order.

1. Plaintiff Failed to Specifically Plead Special Damages

Plaintiff must establish that he suffered special damages as a result of statements published by Defendants. Both the

Federal Rules of Civil Procedure and the Michigan Court Rules require that "[w]hen items of special damages are claimed, they shall be specifically stated." Fed. R. Civ. P. 9(g); M.C.R. 2.112(I) (brackets added).

In his Second Amended Complaint, Plaintiff alleged that he "has suffered special damages as a result of Defendants' actions." At ¶ 88. In his response to Defendants Motions for Summary Judgment, however, Plaintiff stated the following:

> As to Defendants' statements, "Plaintiff complains that the International Union Defendants published negative information about him that was false" and "In Michigan defamation related claims must be pleaded with specificity", Plaintiff admits. As to Defendants' statements, "In his Complaint, Plaintiff failed to identify the exact statements and documents about which he is complaining; he failed to identify who uttered the statements or wrote the documents about which he is complaining; he failed to identify when and where the alleged statements and documents were published; and he failed to identify the defamatory nature of the statements and documents about which hie] is complaining", Plaintiff admits and further avers that Plaintiff only discovered the statements and documents during discovery. As to Defendants' statement, "Therefore, Count Ill of the Complaint should be dismissed", Plaintiff denies for reason same is untrue.

Pl. Br. at 4 (emphasis in original; brackets added).

While Plaintiff pled special damages in his Second Amended Complaint, he failed to do so, by his own

admission, with specificity.[7] As a matter of law, Plaintiff has failed to establish the third element of the prima facie case. It is unnecessary, then, for the Court to consider the first and second elements of the claim. Defendants are entitled to summary judgment on Plaintiff's injurious falsehood claim.

D. Claim for Intentional Infliction of Emotional Distress

Defendants argue that Plaintiff has failed to state a claim for intentional infliction of emotional distress because their conduct did not rise to the level of "extreme" or "outrageous."

In order to establish a prima facie case for intentional infliction of emotional distress ("IIED"), the Plaintiff must show (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Graham v. Ford*, 237 Mich. App. 670, 674 (1999) (citing *Haverbush v. Powelson*, 217 Mich. App. 228 (1996)).

1. Defendants' Conduct Was Neither Extreme Nor Outrageous

Liability for IIED can be found only where the conduct of which plaintiff complains is "extreme" and "outrageous."

---

[7] In the argument section of his opposition brief, Plaintiff argues that ¶¶ 73-93, but specifically ¶ 77, of his Second Amended Complaint sufficiently pled his injurious falsehood claim with specificity. Pl. Br. at 30. This statement, of course, is wholly contrary to his 'admission' on page 4 of his brief. In light of Plaintiff's 'admission' and given the fact that his specificity argument rests entirely on his Second Amended Complaint, Plaintiff has failed to create a genuine factual issue on this element. Thus, his injurious falsehood claim cannot be sustained.

Michigan courts have determined that conduct is not "extreme" and "outrageous" where

> the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible grounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community ....The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.

Chisolm v. Michigan AFSCME Council 25, 218 F. Supp. 2d 855, 875 (E.D. Mich. 2002) (quoting *Margita v. Diamond Mortgage Corp.*, 159 Mich. App. 181,188 (1987)) (internal quotations and ellipse in original).

Plaintiff principally relies on *Haverbush v. Powelson*, 217 Mich. App. 228 (1996),[8] for the proposition that the facts stated in this case evidence "extreme" and "outrageous" behavior and as such, Defendants are precluded from summary judgment. "The trial court initially makes the determination whether conduct is so extreme as to permit a cause of action for IIED; however, where reasonable minds could differ, the jury is to decide the issue." *Schuitmaker v.*

---

[8] Plaintiff additionally cites Johnson v. Wayne County, 213 Mich. App. 143 (1995), and Wilson v. Kiss, 751 F. Supp. 1249 (E.D. Mich. 1990).

Krieger, 2003 WL 1950238, *7 (Mich. App. 2003) (citing *Doe v. Mills*, 212 Mich. App. 73, 92 (1995)).

Defendants' conduct, taken individually or as a whole, simply does not rise to the level of conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible grounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community...*Chisolm*, 218 F. Supp. 2d at 875 (quoting *Margita*, 159 Mich. App. at 188) (ellipse in original).

Moreover, the case Plaintiff principally relies upon as an example of "extreme and outrageous" behavior does not assist his argument because the *Haverbush* Court found that

> a rational trier of fact could find that [the defendant's] conduct was so outrageous in character and so extreme in degree that it went beyond all bounds of common decency in a civilized society. [The defendant] engaged in an escalating series of acts over a two-year period in which she: (1) sent a barrage of letters to Haverbush, to his daughter, and to his future in-laws, in which she called him a compulsive liar, threatened his fianc with physical harm, and threatened to tell his colleagues that he had harassed [the defendant]; (2) left lingerie on Haverbush's vehicles and at his residence several times; (3) left an ax and a hatchet on his vehicles, after having asked him how his fiancee would like to have an ax through her windshield; (4)told a co-worker several times that someone should "ice" Haverbush; and (5) wrote several letters threatening to move in with him even though he was engaged and would soon be married.

217 Mich. App. at 234-35.

Certainly the actions by Defendants in this case do not begin to approach the level of those in Haverbush. Moreover, assuming that Defendants did call Plaintiff the "maggot of mayhem", Pl. 2d Compl. at ¶ 76(f), or a "liar," *id.* at ¶ 76(a), that does not create a factual question because those comments merely constitute "'insults, indignities, threats, annoyances, petty oppressions, or other trivialities'"-all of which are not actionable under an IIED claim. *Chisolm*, 218 F. Supp. 2d at 875 (quoting Margita, 159 Mich. App. at 188) (internal quotations and ellipse in original).

Because Defendants' conduct is neither"extreme" nor"outrageous," Plaintiff cannot establish the first element of his IIED, and as such, summary judgment in Defendants favor on this claim is appropriate.

E. Claim for Continuing Acts of Defamation/Retaliation

Local Defendants assert that Plaintiff's claim for continuing acts of defamation/retaliation cannot be sustained because there is no evidence that Mitchell wrote or distributed posters/fliers which cast Plaintiff in a negative light. Moreover, Local 51 contends that there is no evidence that Bianchi, Stokes and Yokich removed Plaintiff from Local 51 bylaws committee. Finally, Local Defendants contend that there is no evidence that Plaintiff was denied the opportunity to review either membership minutes from November 2002 through February 2003 or lost time vouchers for Bianchi, Martin, Waingrow, Grant and Williams.

The International Union also argues that International Union Defendants are not individually liable for continuing defamation/retaliation. Specifically, it is asserted that there is no factual basis for Plaintiff's claims that Stokes (1) disagreed with Plaintiff's views about lost time; (2) that the International

Union has a policy against distributing copies of minutes of Local 51 meetings; (3) that Stokes' investigation of the 1998 challenged election and recommended that the election be overruled; and (4) that Stokes' determination that Plaintiff's internal appeals were untimely.

Moreover, international Union maintains that Maurice Mitchell cannot be held liable to Plaintiff because there is no factual basis upon which he can show that Maurice Mitchell was part of the International Union's policy to destroy him. Further, the International Union argues that Cutway is a party to this lawsuit solely because he referred to Plaintiff as a "liar." Even if this were true, argues International Union, it does not, by itself, establish a cognizable legal claim against Cutway.

International Union further argues that Geis is a party to this action because he decided that Plaintiff's 1998 charges of financial impropriety against Kirksey were unsubstantiated. Plaintiff contends that Gels' letter was written as part of a conspiracy launched by Local 51 and the International Union. Plaintiff, International Union maintains, has no proof for this claim.

International Union continues, arguing that Yokich cannot be held liable for Plaintiff's injuries given that Yokich participated in the decision to adhere to Stokes' recommendation and require a re-run election because he did so as a member of the IEB. Under Art. 33 of the UAW Constitution, the IEB renders decisions at the second level of the internal appeals process. Because Plaintiff did not specifically claim that Yokich inappropriately refused to uphold appeals against Plaintiff's political opponents, he should not be held liable for the IEB's action.

International Union further argues that Gooden is not liable for Plaintiff's injuries. According to Plaintiff, the letter Gooden received from Geis indicating that his investigation had exonerated Kirksey, and a letter he later sent instructing Plaintiff's political ally John Williams that he could not simultaneously serve as Chief Steward and President of the Local 51, combined with the proratification leaflet (featuring his picture on it), provide proof of Gooden's role in a Local 51-International Union conspiracy against Plaintiff. International Union argues that no violation or claim is shown by these facts.

Finally, International Union asserts that Plaintiff has not brought forth sufficient facts to support a claim against Wojcik. Plaintiff alleges that Wojcik told members that they should not associate themselves with Plaintiff and that Wojcik was going to "gut" Plaintiff and his political associates. Plaintiff further alleges that Wojcik undermined Plaintiff as a Committeeman when he overturned a grievance settlement and thwarted his efforts to address a perceived contract violation involving skilled trades work.

By Order of this Court, Plaintiff was permitted to submit a Second Amended Complaint whereby he added a continuing acts of defamation/retaliation claim. In it, he alleged several instances of such acts, each of which took place in 2002 and 2003. Pl. 2d Amend. Compl. at ¶¶ 105-130.

The Court finds that Defendants have met their burden by pointing out to the Court that Plaintiff, having had sufficient opportunity for discovery, has no evidence to support an his claim for continuing acts of defamation/retaliation. See Tolton, 48 F.3d 937; Street, 886 F.2d 1472.

Because Defendants have met their burden, Plaintiff cannot rest on its pleadings, but must present significant probative evidence in support of his complaint. *Copeland*, 57 F.3d at 479. As to his claim for continuing acts of retaliation/defamation, Plaintiff offers only the meager following: "Plaintiff has by affidavit produced evidence of defendants' continuing acts." Pl. Br. at 31.

Presumably, Plaintiff is alluding to his own affidavit. Pl. Exh. 2, Pl. Aff. However, even a cursory reading of the affidavit reveals that only one paragraph of the affidavit makes any reference to a continuing act of retaliation/defamation in either 2002 or 2003. Pl. Exh. 2, Pl. Aft., ¶ 13. Accordingly, this is the only claim that the Court will consider given that Plaintiff bears the burden of presenting significant probative evidence which would create a question for the jury.

Plaintiff alleged that throughout all relevant periods, he was the elected chairman of the Local 51 bylaws committee, Pl. 2d Amend. Compl. at ¶ 106, and that he was wrongly removed from that position by Bianchi, Stokes and Yokich in September 2002. *Id.* at ¶ 113. Local 51argues that "Bianchi did not hold a union position in September 2002 and, therefore, had no ability to remove Plaintiff from" the committee. Local 51 Br. at 19. Moreover, Local 51 informs the Court that Yokich passed away in August 2002 and, thus, "likely had no ability to remove Plaintiff from the" committee. *Id.*

In his affidavit, Plaintiff swore: "I was unaware that the bylaws committee of which I was chairman in 2000 had been dissolved by the Local and International defendants and that I had been removed as chairman until discovery in this case in 2003." Pl. Exh. 2, Pl. Aft., ¶ 13 (brackets added). Clearly,

Plaintiff has presented nothing beyond the fact that a committee he had chaired was dissolved. He fails to bring forth any evidence that either Bianchi, Stokes or Yokich were involved in the decision or that the decision to dissolve was 26 improper in his motion papers.

Accordingly, Plaintiff's claim for continuing acts of defamation/retaliation cannot be sustained and Defendants are entitled to summary judgment.

V. CONCLUSION

For the reasons stated above, the Court GRANTS summary judgment in favor of Defendants on all of Plaintiff claims.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 01-74983

[Filed November 18, 2003]

RICHARD WEBSTER,
Plaintiff-Appellant,

v.

UNITED AUTO WORKERS, LOCAL 51, INTERNATIONAL UNITED AUTO WORKERS, ARTHUR BIANCHI, NATHANIEL MARTIN, GIL WOJCIK, ROSALYN GRANT, HOLLY WAINGROW, WILLIAM MICHAEL KIRKSEY, ILLIE WILLIAMS, ROBERT LEE MITCHELL, JAMES MOORE, STEPHEN YOKICH, MAURICE MITCHELL, STAN GEIS, PETE CUTWAY, NATE GOODWIN, and EUNICE STOKES, jointly and severally,
Defendants-Appellees.

JUDGMENT IN FAVOR OF DEFENDANTS

This matter came before the Court on Defendants' Motions for Summary Judgment [Docs. 34 and 35], which was granted in an Opinion and Order entered on November 4, 2003. Therefore,

Judgment is GRANTED in favor of Defendants on all claims.

IT IS SO ORDERED.

United States District Judge

Dated: NOV 04 2003

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 01-74983

[Filed November 18, 2003]

RICHARD WEBSTER,
Plaintiff-Appellant,

v.

UNITED AUTO WORKERS, LOCAL 51, INTERNATIONAL UNITED AUTO WORKERS, ARTHUR BIANCHI, NATHANIEL MARTIN, GIL WOJCIK, ROSALYN GRANT, HOLLY WAINGROW, WILLIAM MICHAEL KIRKSEY, ILLIE WILLIAMS, ROBERT LEE MITCHELL, JAMES MOORE, STEPHEN YOKICH, MAURICE MITCHELL, STAN GEIS, PETE CUTWAY, NATE GOODWIN, and EUNICE STOKES, jointly and severally,
Defendants-Appellees.

ORDER DENYING MOTION FOR REHEARING AND/OR RECONSIDERATION

On November 14, 2003, Plaintiff filed a Motion for Rehearing and/or Reconsideration (Doc. #53) and on November 17, 2003, Plaintiff filed a Corrected Motion for Rehearing and/or Reconsideration.

Plaintiff's Motions present the same issues already ruled on by the Court. Further, Plaintiff has failed to demonstrate a palpable defect by which the Court and the parties have been misled. L.R. 7(g)(3).

For these reasons, the motions are DENIED.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
JUL 29 2005
OFFICE OF THE CLERK

No. 05-27

IN THE

Supreme Court of the United States

RICHARD WEBSTER,

Petitioner,

v.

UNITED AUTO WORKERS, LOCAL 51, INTERNATIONAL AUTO WORKERS, ARTHUR BIANCHI, NATHANIEL MARTIN, GIL WOJCIK, ROSLYN GRANT, HOLLY WAINGROW, WILLIAM MICHAEL KIRKSEY, OLLIE WILLIAMS, ROBERT LEE MITCHELL, JAMES MOORE, STEPHEN YOKICH, MAURICE MITCHELL, STAN GEIS, PETE CUTWAY, NATE GOODEN, AND EUNICE STOKES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROGER J. MCCLOW *
WILLIAM J. KARGES
KLIMIST, MCKNIGHT, SALE,
MCCLOW & CANZANO, P.C.
400 Galleria Officentre, Suite 117
Southfield, MI 48034
(248) 354-9650

* Counsel of Record

Counsel for Respondents UAW Local 51, Bianchi, Martin, Grant, Waingrow, Williams, Robert Lee Mitchell and Moore

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

I. Did the Sixth Circuit correctly hold that Petitioner was not "otherwise disciplined" within the meaning of Section 609 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §529, when it is undisputed that Petitioner voluntarily retired from his employment and that neither Local 51 nor its officers nor its members took any action against him which affected his status as a local union member?

PARTIES TO THE BRIEF

This Brief in Opposition is filed by Respondents UAW Local 51 and its current and former officers Arthur Bianchi, Nathaniel Martin, Roslyn Grant, Holly Waingrow, Ollie Williams, Robert Lee Mitchell and James Moore. In this Brief, these individual Respondents are sometimes referred to as the Local Defendants.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE BRIEF	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
STATUTORY PROVISIONS	4
REASONS FOR DENYING THE WRIT	5
CONCLUSION	7

TABLE OF AUTHORITIES

CASES — Page

Breininger v. Sheet Metal Workers Local 6, 493 U.S. 67, 110 S.Ct. 424, 107 L.Ed.2d 388 (1989) 5, 6

Kinslow v. Briscoe, 222 F.3d 269 (7th Cir. 2000) .. 5

Konen v. Teamsters, 255 F.3d 402 (7th Cir. 2001) 6

United Food Workers Local 911 v. United Food Workers, 301 F.3d 468 (6th Cir. 2002) 6

STATUTES

29 U.S.C. §411(a)(2) 4, 6

29 U.S.C. §529 ..... 4, 5, 6

COURT RULE

Supreme Court Rule 42.2 7

IN THE

Supreme Court of the United States

No. 05-27

RICHARD WEBSTER,

Petitioner,

v.

UNITED AUTO WORKERS, LOCAL 51, INTERNATIONAL AUTO WORKERS, ARTHUR BIANCHI, NATHANIEL MARTIN, GIL WOJCIK, ROSLYN GRANT, HOLLY WAINGROW, WILLIAM MICHAEL KIRKSEY, OLLIE WILLIAMS, ROBERT LEE MITCHELL, JAMES MOORE, STEPHEN YOKICH, MAURICE MITCHELL, STAN GEIS, PETE CUTWAY, NATE GOODEN, AND EUNICE STOKES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The "facts" as recited in the Petition bear scant resemblance to the record which was developed in the trial court. It is impracticable and unnecessary to identify and correct the many inaccuracies and unsupported "factual" assertions in the Petition.

Many of the recited "facts" are entirely irrelevant to the issue raised in the Petition. For example, Mr. Webster details

his disputes with a William Michael Kirksey. (Petition at 4-5). Although listed in the caption, Mr. Kirksey was never a defendant. (Apx.196-202).

Mr. Webster claims that Defendants Bianchi, Stokes and Yokich wrongfully removed him from the Local 51 by-laws committee in September 2002. (Petition at 10). Neither Mr. Bianchi nor Mr. Yokich were in office in September 2002. Mr. Bianchi, who was elected Local 51 President in May 1999, was defeated in his reelection bid in May 2002 and left office in July 2002. (Apx. 1252). Mr. Yokich retired as UAW President in June 2002 and died in August 2002. (Apx. 324-327).

Mr. Webster claims that he retired in 2003 because of the "continuing acts of the named Defendants," including threats by UAW President Yokich. (Petition at 10). Mr. Webster, who actually retired in December 1999, admittedly had no evidence that any of the Defendants were responsible for the so-called "continuing acts" that he alleges occurred after his retirement. (Apx. 425). And, of course, Mr. Yokich did not engage in any "continuing acts" after his death.

The actual record, as developed during discovery, discloses that Mr. Webster was hired by Chrysler Corporation in 1964. (Apx. 342-43). He held full time elected positions with Local 51 since approximately 1974. (Apx. 340-43).

In May 1998, Mr. Webster, Robert Lee Mitchell and James Moore were elected to a three-year term as Shop Committeemen. In that election, Arthur Bianchi was elected Chief Steward. (Apx. 339, 346-347). Mr. Webster's opponent, Darryl Mitchell, challenged the election. (Apx. 828-842). Mr. Webster, Mr. Mitchell, Mr. Moore and Mr. Bianchi together opposed a rerun of the election. After an investigation, the International UAW ordered a new election for all positions. (Apx. 346-347; 853-864). In the rerun, Mr. Webster, Mr. Mitchell, Mr. Moore and Mr. Bianchi were once again elected. (Apx. 339, 346-347).

As the elected officers of Local 51, Mr. Webster and the Local Defendants comprised Local 51's bargaining committee. (Apx. 1255). In August 1999, Local 51 and Chrysler began negotiations for a new local agreement. (Apx. 367). Mr. Webster participated fully in all the bargaining sessions. (Apx. 367-73). On October 21, 1999 Chrysler and the bargaining committee reached a tentative settlement agreement which provided that ". . . [t]he Union will recommend to the membership that it be ratified . . . ." (Apx. 274-84). The entire bargaining committee, including Mr. Webster, signed the settlement agreement. (Apx. 375-80).

Shortly after negotiations concluded, the bargaining committee distributed a document entitled "Contract Highlights" which outlined the major contract changes. (Apx. 285-292). On the same day, and despite having signed the settlement agreement, Mr. Webster distributed a document entitled "Contract Low Lights." (Apx. 293-294).

The membership of Local 51 rejected the settlement agreement. (Apx. 400). Thereafter, members circulated a petition seeking another ratification vote. (Apx. 409). After a second ratification vote was scheduled, Mr. Webster continued his campaign against the settlement agreement. (Apx. 299-305, 402-403). In response, the Local Defendants published a series of documents entitled "A Candid Conversation With Sir Richard of Webster." (Apx. 306-311). These "candid conversations," in question and answer format, depicted fictitious, satirical conversations with Mr. Webster in which he admitted, among other things, that he had a history of misleading the membership. The Local Defendants also distributed flyers in response to Mr. Webster's campaign against the settlement agreement entitled: "Are You Interested in the Truth;" "Let's Talk About the Truth;" and "So Richard You Want An Apology" in which they apologized for not confronting him sooner. (Apx. 312-316).

On November 4, 1999, the membership ratified the settlement agreement. (Apx. 317).

Mr. Webster then filed internal union charges against the Local Defendants based, among other things, on the ratification vote campaign literature. (Apx. 348, 352, 410-411).

On December 31, 1999, Mr. Webster retired from his employment with Chrysler. Under the 1999 National Agreement between the UAW and Chrysler, Mr. Webster was required to give up his position as Shop Committeeman. (Apx. 334-335).

Between the ratification vote and Mr. Webster's retirement, none of the Local Defendants published any documents critical of him. During that time, Mr. Webster was able to carry out his duties as Shop Committeeman without interference from them.

Long after his retirement (and after Mr. Webster filed this lawsuit), flyers critical of him were posted in the plant. (Apx. 67, 69). The trial court permitted Mr. Webster to amend his complaint to allege that these flyers constituted continuing retaliation. In discovery, he admitted that he had no evidence that any of the Local Defendants wrote or distributed any of them. (Apx. 425).

Mr. Webster remains a (retired) member of Local 51 in good standing. (Apx. 67).

STATUTORY PROVISIONS

Section 101(a)(2) of the Labor Management Reporting and Disclosure Act, ("LMRDA"), 29 U.S.C. §411(a)(2), grants union members the rights of free speech and assembly. Section 609 of the LMRDA, 29 U.S.C. §529, prohibits a labor organization from disciplining its members for exercising those rights:

> It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a

> labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of his chapter. . . .

REASONS FOR DENYING THE PETITION

Mr. Webster asserts that there is a split in the Circuits on the meaning of "otherwise discipline" in Section 609 of the LMRDA. As he did below, Mr. Webster relies principally on *Kinslow v. Briscoe*, 222 F.3d 269 (7th Cir. 2000).

There is no conflict in the Circuits. This Court has already provided the controlling definition of "otherwise discipline" in *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 91, 110 S.Ct. 424, 107 L.Ed.2d 388 (1989).[1] This Court narrowly construed the phrase to mean discipline by a union acting as a collective entity rather than ad hoc retaliation:

> [W]e find that by using the phrase "otherwise discipline," Congress did not intend to include all acts that deterred the exercise of rights protected under the LMRDA, but rather meant instead to denote only punishment authorized by the union as a collective entity to enforce its rules. . . . The term refers only to actions "undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership." (citations omitted).

In *Kinslow*, the Seventh Circuit did not address the issue of what constituted "other" discipline under the LMRDA. It had no need to do so. Mr. Kinslow had been *expelled* from the

---

[1] Mr. Webster spends considerable time discussing Justice Stevens' dissent in *Breininger*. (Petition at 17-19). The fact that there was a dissent on the relevant issue has no bearing on whether this Petition should be granted. Mr. Webster also cites various decisions predating *Breininger*. (Petition at 13-14). Cases decided before this Court addressed the meaning of "otherwise discipline" in *Breininger* have no bearing on whether there is a post-*Breininger* split in the Circuits.

union. Expulsion is one of the specific types of discipline prohibited under Section 609.

Any question as to whether, in *Kinslow*, the Seventh Circuit followed *Breininger* (which it did not mention) or correctly applied Section 609 (which it did not cite) was resolved by *Konen v. Teamsters*, 255 F.3d 402, 408-09 (7th Cir. 2001). There, in an opinion written by the same judge who wrote *Kinslow*, the court quoted at length from *Breininger*, including the statement that the "specifically enumerated types of discipline—fine, expulsion, and suspension—imply some sort of established disciplinary process rather than ad hoc retaliation by individual union members." *Breininger*, 493 U.S. at 91-92.

In *United Food Workers Local 911 v. United Food Workers*, 301 F.3d 468, 474 (6th Cir. 2002), the Sixth Circuit looked to *Konen* in reaching the same conclusion. There is no split between the Sixth and Seventh Circuits. Regardless, the decision of the Sixth Circuit below is consistent with *Breininger* even if *Kinslow* somehow was not.

Mr. Webster was not the subject of discipline of any kind. He was subjected to intense criticism for reneging on his promise to support the settlement agreement. This criticism, Mr. Webster claims, caused him to retire. But, the Local Defendants were also members of Local 51. They had the same rights to criticize Mr. Webster for his actions as an elected union official as he had to criticize them. The literature they wrote pertained to important union matters—the ratification of the local labor agreement that the bargaining committee took two months to negotiate. Certainly, the exercise of free speech by the individuals Mr. Webster sued—speech which itself is protected *by* Section 101(a)(2) of the LMRDA—cannot be equated with discipline *under* the LMRDA.

CONCLUSION

Mr. Webster's Petition should be denied. Respondents request that, given the Petition's frivolous nature, they be awarded double costs and attorney fees under Rule 42.2.

Respectfully Submitted,

ROGER J. MCCLOW *
WILLIAM J. KARGES
KLIMIST, MCKNIGHT, SALE,
MCCLOW & CANZANO, P.C.
400 Galleria Officentre, Suite 117
Southfield, MI 48034
(248) 354-9650

* Counsel of Record

Counsel for Respondents UAW Local 51, Bianchi, Martin, Grant, Waingrow, Williams, Robert Lee Mitchell and Moore